83-277

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, PETITIONER

v.

HOME SAVINGS AND LOAN ASSOCIATION OF LAWTON, OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the Administrator of Veterans' Affairs may be equitably estopped from relying on a valid regulation providing that forgery is a defense to liability on a home loan guaranty.

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The Solicitor General, on behalf of the Administrator of Veterans' Affairs, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-26a) is reported at 695 F.2d 1251. The opinion of the district court (App. C, *infra*, 30a-37a) is not reported. The order of the district court, filed August 29, 1979, denying cross-motions for summary judgment (App. E, *infra*, 39a-41a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. F, *infra*, 42a) was entered on December 21, 1982. A timely petition for rehearing was denied on April 21,

1983 (App. B, *infra*, 27a-29a). On July 15, 1983, Justice White extended the time for filing a petition for a writ of certiorari to and including August 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

REGULATION INVOLVED

38 C.F.R. 36.4325(a) provides:

> Subject to the incontestable provisions of 38 U.S.C. 1821 as to loans guaranteed or insured on or subsequent to July 1, 1948, there shall be no liability on account of a guaranty or insurance, or any certificate or other evidence thereof, with respect to a transaction in which a signature to the note, the mortgage, or any other loan papers, or the application for guaranty or insurance is a forgery; or in which the certificate of discharge or the certificate of eligibility is counterfeited, or falsified, or is not issued by the Government.

STATEMENT

1. The Veterans' Benefits Act, 38 U.S.C. (& Supp. V) 1801 *et seq.*, establishes a program under which the Veterans' Administration ("VA") guarantees loans made to veterans to assist them in securing residential housing. Under the program the VA may guarantee up to 60% of the amount of a loan to be applied to the purchase or construction of a residence. 38 U.S.C. (& Supp. V) 1803(a)(1). In the event the veteran defaults on the loan, the VA generally must pay the amount owing under the terms of the guaranty. However, Congress has authorized the Administrator of Veterans' Affairs ("Administrator") to establish defenses to liability through promulgation of regulations. See 38 U.S.C. (Supp. V)

210(c)(1) and 1821.[1] Pursuant to this delegation of authority, the Administrator has promulgated 38 C.F.R. 36.4325(a), which provides in part that "there shall be no liability on account of a guaranty * * * with respect to a transaction in which a signature to the note, the mortgage, or any other loan papers, or the application for guaranty or insurance is a forgery * * *."

When the Administrator receives notice of a foreclosure sale, he may specify in advance of the sale the minimum amount that will be credited to the indebtedness of the borrower. 38 C.F.R. 36.4320(a); *United States* v. *Shimer*, 367 U.S. 374, 379-380 (1961). The holder of the mortgage note may then bid the specified amount for the property at the foreclosure sale. If that bid is successful, the holder of the note may elect within 15 days of the sale to convey the property to the VA. 38 C.F.R. 36.4320(a)(1). Once the property is transferred, the VA

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[1] 38 U.S.C. (Supp. V) 210(c)(1) provides that "[t]he Administrator has authority to make all rules and regulations which are necessary or appropriate to carry out the laws administered by the Veterans' Administration and are consistent therewith * * *." 38 U.S.C. 1821 provides:

> Any evidence of guaranty or insurance issued by the Administrator shall be conclusive evidence of the eligibility of the loan for guaranty or insurance under the provisions of this chapter and of the amount of such guaranty or insurance. Nothing in this section shall preclude the Administrator from establishing, as against the original lender, defenses based on fraud or material misrepresentation. The Administrator shall not, by reason of anything contained in this section, be barred from establishing, by regulations in force at the date of such issuance or disbursement, whichever is the earlier, partial defenses to the amount payable on the guaranty or insurance.

will pay the holder the amount previously specified by the Administrator. 38 C.F.R. 36.4320(g).

2. On April 7, 1971, the Oklahoma Mortgage Company loaned $34,000 to Percy Durham, a veteran, and his wife, Zelma Durham. The VA guaranteed the mortgage pursuant to 38 U.S.C. (& Supp. V) 1803(a)(1) and 1810(c). Several weeks later Oklahoma Mortgage assigned the note, mortgage, and loan guaranty certificate to respondent Home Savings and Loan Association of Lawton, Oklahoma. However, Oklahoma Mortgage continued as service agent for respondent in connection with the mortgage. App. A, *infra*, 2a; App. C, *infra*, 31a.

Within a few years the Durhams defaulted on their mortgage payments, and on July 12, 1974, respondent began foreclosure proceedings. A foreclosure judgment was entered in Oklahoma state court on December 6, 1974. On January 28, 1975, there was a foreclosure sale of the property, at which respondent bid $30,000—the amount the VA had specified pursuant to 38 C.F.R. 36.4320(a)(1). Respondent then elected to convey the property to the VA pursuant to 38 C.F.R. 36.4320(g). On February 24, 1975, a sheriff's deed to the property was recorded in the name of the Administrator, and on April 4, 1975, the VA paid respondent $30,000. After making repairs, the VA on April 16, 1975, conveyed the property to third parties for the price of $31,000. App. A, *infra*, 2a; App. C, *infra*, 32a-33a.

Meanwhile, on approximately February 24, 1975 (the day the sheriff's deed to the property was recorded in the name of the Administrator), Oklahoma Mortgage informed the VA that it had received information that the signatures of Zelma Durham on the note and mortgage might be forgeries. The VA

began an investigation, but did not inform respondent of the allegation of forgery. App. A, *infra*, 2a-3a; App. C, *infra*, 32a-33a.

On October 16, 1975, the VA paid respondent $6,733.19 pursuant to the guaranty, based on respondent's claim for losses incurred in connection with the default.[2] Around this time, the VA investigation confirmed that Mrs. Durham's signatures on the note and mortgage were in fact forgeries. On October 28, 1975, the VA asked respondent to return the $6,733.19 payment, and respondent complied by sending a check for that amount to the VA. The VA then requested that respondent remit an additional $1,055.46 plus interest, representing losses (including sales expenses) the VA had incurred in selling the property to third parties. Respondent refused to pay the additional amount, and the VA subsequently recovered the sum through an offset against other VA funds due to respondent. App. A, *infra*, 2a-3a; App. C, *infra*, 33a-34a.

3. Respondent brought this suit against the Administrator, Oklahoma Mortgage Company (the original lender and subsequently the service agent), and the American First Title and Trust Company (the company that had issued a title insurance policy to Oklahoma Mortgage that apparently covered loss from forgery).[3] Respondent sought primarily to enforce

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[2] The payment may have been made to respondent because of a breakdown in communication between the section of the VA that is responsible for investigation of forgeries and the section responsible for payment of claims. June 11, 1980, Tr. 72.

[3] Respondent originally filed its suit in Oklahoma state court in 1976, naming only American First Title and Trust and Oklahoma Mortgage as defendants. In 1978, respondent

the alleged liability of the VA on the loan guaranty certificate. In August 1979, the United States District Court for the Western District of Oklahoma (Eubanks, J.) denied cross-motions for summary judgment, stating, *inter alia*, that "[t]he court does not believe that the [VA's forgery] defense is barred by any estoppel theory" (App. E, *infra*, 41a). On June 11, 1980, the district court (West, J.) held a hearing, at which Mrs. Durham testified that her signatures had been forged. However, respondent again contended that the VA should be estopped from raising forgery as a defense to its liability on the guaranty, on the ground that the agency knew about the possibility of forgery when it accepted conveyance of the property and resold it. App. C, *infra*, 30a, 34a-35a.

The district court held that the VA was estopped from asserting forgery as a defense to liability on the guaranty (App. C, *infra*, 30a-37a). The court announced that the government could be estopped when necessary to prevent injustice to private parties who had relied to their detriment on a government agent's statements or conduct, so long as there was no impairment of "the public's interests" (*id.* at 35a). The court found the elements of estoppel to be "clearly satisfied," observing that the VA had purchased and sold the property without notifying respondent of the alleged forgery and, by conveying the property to third parties, "effectively precluded [respondent] from making itself whole by retaining the property and possibly reselling at a higher price" (*id.* at 36a). The court concluded that the public pol-

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added the Administrator as a defendant. The Administrator then removed the action to the United States District Court for the Western District of Oklahoma. App. C, *infra*, 34a.

icy of the United States would not be frustrated by directing the VA to honor the guaranty, since the VA had an "independent right of indemnity" under the statute (*id.* at 36a-37a).[4] The court entered judgment for respondent against the Administrator in the amount of $7,838.13, the total of the two sums the VA had recovered from respondent. The judgment recited that no liability was found concerning American First Title and Trust Company and Oklahoma Mortgage Company. App. D, *infra*, 38a.

4. A divided panel of the court of appeals affirmed (App. A, *infra*, 1a-26a). The court of appeals recognized that this Court has declined on numerous occasions to apply the doctrine of equitable estoppel to prevent the government from enforcing statutes or regulations. However, the court of appeals purported to distinguish those decisions on various grounds, concluding that none of them "present[s] facts having any similarity to those here" (*id.* at 3a). The court characterized the VA's acceptance of the sheriff's deed and its subsequent payment of $30,000 to respondent as "affirmative actions" on which respondent was "entitled to rely" (*id.* at 7a). In the court's view, respondent was entitled to treat the transaction as an accomplished fact, and when the VA verified months later that the signatures were forged, "it was too late to unravel the yarn" (*ibid.*). Like the district court, the court of appeals concluded that estoppel would not harm the fiscal poli-

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[4] The district court appears to have been referring to the possibility that the VA could recover its loss on the guaranty from the veteran who had obtained the loan. See 38 C.F.R. 36.4323(e); *United States* v. *Shimer*, *supra*, 367 U.S. at 386-388.

cies of the United States, since the VA had recourse against the borrowing veteran (*ibid.*).[6]

The court of appeals rejected the government's contention that respondent could not have relied on the VA's failure to disclose the possibility of forgery. The court characterized as "speculative" respondent's claim that it could have sold the property at a profit if it had retained it (App. A, *infra*, 7a). However, the court concluded that the VA's affirmative acts from the time of the foreclosure suit until after the guaranty payment "led [respondent] to rely on its compliance with VA regulations" and "were inconsistent with denial of the validity of the original loan transaction" (*id.* at 8a).

Judge McKay dissented (App. A, *infra*, 9a-26a). He concluded that the majority's attempts to distinguish past decisions of this Court declining to estop the government "will prove to be chimerical rather than precedential and will introduce new contradictions into an already confused area of law" (*id.* at 9a). Judge McKay disputed what he perceived as the majority's attempt to distinguish respondent's claim on the ground that it involved a "commercial transaction" (*id.* at 14a-16a). He found that the VA loan guaranty program was more in the nature of a subsidy than a commercial transaction and that in any event this Court in *FCIC* v. *Merrill*, 332 U.S. 380

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[6] The court of appeals erroneously stated (App. A, *infra*, 6a) that the parties agreed that the district court had correctly articulated the test for estoppel. The government's supplemental brief in the court of appeals made clear that it is the government's position that principles of equitable estoppel have no application to the United States and that the district court erred in applying to the government the test for estoppel that is applicable to private parties.

(1947), had rejected the view that the government has the status only of a private litigant when it engages in commercial activities.

In Judge McKay's view, respondent had not established even the preliminary elements of estoppel (including those elements that would be necessary to estop a private party), since it had not shown the existence of misleading conduct that induced reasonable detrimental reliance (see App. A, *infra*, 17a-18a). Judge McKay was unable to identify any legally imposed duty, or even a good faith obligation, that would require the VA to notify loan guaranty holders when the agency receives an allegation of forgery (*id.* at 24a). Even assuming there were such a duty of disclosure, Judge McKay determined that the VA's silence here could not have been misleading, since respondent apparently had elected to convey the property before the agency received the forgery allegation (*id.* at 24a-25a). Because he concluded that the VA had not engaged in misleading conduct, Judge McKay found it unnecessary to reach the questions whether respondent's reliance was reasonable, whether it resulted in any detriment, and whether there were other considerations suggesting that the court should withhold the exercise of its equitable powers (*id.* at 26a).[6]

The court of appeals denied the Administrator's petition for rehearing with suggestion for rehearing en banc, Judges McKay, Logan, and Seymour dissenting (App. B, *infra*, 27a-29a).

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[6] Judge McKay noted, however, that he agreed with the majority that respondent's claim of detriment was speculative, since respondent had introduced no evidence that it could have sold the property for more than it received from the VA (App. A, *infra*, 26a n.21).

REASONS FOR GRANTING THE PETITION

Despite this Court's recent decisions reaffirming the principle that the government may rarely, if ever, be equitably estopped from enforcing a valid statute or regulation, the lower courts continue to disregard that principle and to distinguish the Court's decisions on any available ground.[7] Here the court of appeals concluded that this Court's decisions did not govern, simply because the facts of this case differ from those presented by previous estoppel cases. It went on to hold that the Administrator of Veterans' Affairs is estopped from asserting a longstanding statutorily authorized defense to liability on a home loan guaranty under circumstances that would not even warrant estoppel of a private party.

The court of appeals' ruling cannot be reconciled with the unbroken line of this Court's decisions establishing that the government may not be estopped, at least in the absence of serious affirmative misconduct. See, *e.g.*, *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Montana v. Kennedy*, 366 U.S. 308, 314-315 (1961); *FCIC* v. *Merrill*, 332 U.S. 380 (1947). In particular, the decision conflicts with this Court's repeated instruction to the lower courts not to use estoppel as a means of circumventing statutorily authorized restrictions on payments from the federal treasury. See *Schweiker* v. *Hansen*, *supra*, 450 U.S. at 788, quoting *FCIC* v. *Merrill*, *supra*, 332

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[7] See, *e.g.*, *Community Health Services* v. *Califano*, 698 F.2d 615 (3d Cir. 1983), petition for cert. pending, No. 83-56 (filed July 14, 1983); *Portmann* v. *United States*, 674 F.2d 1155 (7th Cir. 1982); *Meister Bros.* v. *Macy*, 674 F.2d 1174 (7th Cir. 1982); *McDonald* v. *Schweiker*, 537 F. Supp. 47 (N.D. Ind. 1981); *Armstrong* v. *United States*, 516 F. Supp. 1252 (D. Colo. 1981).

U.S. at 385. For this reason, and because the decision of the court of appeals threatens the sound administration of the VA home loan guaranty program, as well as other federal programs, by preventing recovery of substantial sums of money owed to the government, review by this Court is warranted.

1. a. This Court has repeatedly and consistently held that the government may not be equitably estopped from enforcing the laws, even though private parties may, as a result, suffer hardship in particular cases. See, *e.g.*, *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366, 369-370 (1813); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Sutton* v. *United States*, 256 U.S. 575, 579 (1921); *Utah* v. *United States*, 284 U.S. 534, 545-546 (1932); *Wilber National Bank* v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *FCIC* v. *Merrill*, *supra*, 332 U.S. at 384; *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *Montana* v. *Kennedy*, *supra*, 366 U.S. at 314-315; *INS* v. *Hibi*, *supra*, 414 U.S. at 8; *Schweiker* v. *Hansen*, *supra*; *INS* v. *Miranda*, *supra*. Indeed, we know of no decision of this Court holding that estoppel lies against the government in any circumstance.[8]

This rule is founded on the doctrines of sovereign immunity and separation of powers. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *Dixon* v.

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[8] In several cases the Court has declined to determine whether the government may be estopped in instances involving serious affirmative misconduct. See, *e.g.*, *INS* v. *Miranda*, *supra*, slip op. 3; *Schweiker* v. *Hansen*, *supra*, 450 U.S. at 788. However, the Court has never identified a case in which the facts established such misconduct.

United States, 381 U.S. 68, 73 (1965); *Snyder* v. *Buck*, 340 U.S. 15, 19 (1950); *United States* v. *San Francisco*, 310 U.S. 16, 29-32 (1940). The actions of government employees cannot alter the terms and conditions for the payment of money from the federal treasury that are established by statute or regulation. By the same token, if the judiciary were free to impose otherwise unauthorized liability on the government based simply on its notions of equity, the government would be virtually powerless to control and protect the public fisc.

Congress has expressly authorized the Administrator to promulgate regulations establishing defenses to liability on a guaranty. 38 U.S.C. (Supp. V) 210(c)(1) and 1821. The regulation providing that the VA shall not be liable on a guaranty if a signature on loan papers is a forgery, 38 C.F.R. 36.4325(a), was first promulgated by the Administrator in 1946 and was approved by Congress when it enacted what is now Section 1821 several years later.* The court of

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*The VA home loan guaranty program was established by the Servicemen's Readjustment Act of 1944, ch. 268, 58 Stat. 284, 291. In 1945, Congress substantially liberalized the loan guaranty provisions. Ch. 588, 59 Stat. 623, 626; H.R. Conf. Rep. No. 1449, 79th Cong., 1st Sess. 14-17 (1945). Within a few months of the 1945 amendment, the Administrator promulgated the regulation establishing forgery as a defense to VA liability on a guaranty. See 11 Fed. Reg. 2119, 2123 (1946). When Congress in 1948 enacted what is now 38 U.S.C. 1821, which expressly referred to the Administrator's authority to promulgate regulations establishing defenses to liability on guaranties, it indicated its approval of regulations then in effect. In describing the new provision of the statute, the Senate Report stated: "Defenses based upon fraud or material misrepresentation of the holder, or upon regulations of the Veterans' Administration in force on the date of issuance of the guaranty or disbursement of the loan, are re-

appeals did not suggest that this regulation exceeds the Administrator's powers or is otherwise invalid. By the same token, there is no dispute that Mrs. Durham's signatures on the mortgage and note were forgeries. Thus, the VA was not liable on its guaranty under the terms of the regulation. The decision of the court of appeals that the Administrator should be estopped from recovering payments made in connection with the guaranty disregards a longstanding congressionally authorized limitation on the government's liability and permits unwarranted incursions on the federal treasury.[10]

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served." S. Rep. No. 1701, 80th Cong., 2d Sess. 2 (1948). The regulation establishing the defense of forgery has continued virtually unchanged through the reenactment of Title 38 of the United States Code in 1958 (Pub. L. No. 85-857, 72 Stat. 1105) to the present.

The Administrator has consistently interpreted 38 C.F.R. 36.4325(a) to authorize recovery by the VA after payment, as well as refusal to make a payment in the first place. See *Mt. Vernon Cooperative Bank* v. *Gleason*, 367 F.2d 289, 292 (1st Cir. 1966). The defense of forgery applies against assignees as well as against the original lender. See *Century Federal Savings & Loan Ass'n* v. *Roudebush*, 618 F.2d 969 (2d Cir. 1980).

[10] The courts below concluded that estoppel of the VA in this case would not harm the federal treasury because the agency could always attempt to recover from the veteran borrower (App. A, *infra*, 7a; App. C, *infra*, 36a-37a). However, such attempts at recovery in themselves may be costly, and it is uncertain whether the VA would be able to recover from a borrower who recently defaulted on mortgage payments. The courts below did not explain why they believed it appropriate to impose the burden and risk of attempting to recover from the veteran borrower on the VA, rather than on the original lender, the assignee of the mortgage, or the company that issued the insurance policy in connection with the mortgage. In fact, Congress has delegated to the Administrator, not to

b. The court of appeals concluded that the Administrator should be estopped from recovering funds expended contrary to the regulation because the VA failed promptly to disclose to respondent that it had received an allegation of forgery and because it took "affirmative actions" on which (in the court's view) respondent was entitled to rely, including acceptance of the sheriff's deed on the day the agency learned of the forgery and subsequent payment of $30,000 to respondent in exchange for conveyance of the property (App. A, *infra*, 7a). But this Court's decisions plainly establish that estoppel is not warranted by either the VA's conduct or any "reliance" by respondent on that conduct.[11]

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the courts, the task of deciding whether the government or the holder of the guaranty should bear the risks associated with events such as forgery. Congress clearly did not require the Administrator to bear all possible risks in connection with a home loan guaranteed by the VA. See *United States* v. *Shimer*, *supra*, 367 U.S. at 382-383.

[11] To the extent the majority relied on a purported exception to the general rule against estopping the government in the case of "commercial transactions" (see App. A, *infra*, 5a-6a), it erred, as Judge McKay pointed out (*id.* at 14a-16a). This Court firmly rejected such an exception in *FCIC* v. *Merrill*, *supra*, stating that an undertaking by the federal government "is not an ordinary commercial undertaking," even when the government engages in an activity such as providing insurance. 332 U.S. at 383 n.1. The majority did not mention any relevant feature of the VA loan guaranty program that would distinguish it for these purposes from the crop insurance program at issue in *Merrill*. Moreover, as this Court has noted, "[o]ur country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan* v. *Taxation With Representation*, No. 81-2338 (May 23, 1983), slip op. 10. As Judge McKay observed (App. A, *infra*, 14a-15a), the loan guaranty program is more like a subsidy than an ordinary commercial transaction.

Although this Court has indicated that serious affirmative misconduct might warrant an exception to the rule against estopping the government (see page 11, note 8, *supra*), neither the district court nor the court of appeals purported to find that the VA engaged in any "affirmative misconduct" in this case. The court of appeals concluded only that the VA had failed to disclose the allegation of forgery and that it had taken certain "affirmative actions" in connection with the guaranty. In the absence of any finding of serious affirmative misconduct, there can be no question that the courts below erred in estopping the government. See *INS* v. *Miranda*, *supra*, slip op. 3, 5.

Moreover, it is clear that the VA's actions cannot be characterized as misconduct at all. The record does not show, and the district court did not find, that the VA made any misrepresentation of fact or law. As Judge McKay observed (App. A, *infra*, 23a-24a), the VA has no legal duty to disclose an allegation of forgery. Nor is there any basis for imputing a good faith duty of disclosure to the VA, particularly in the period before the allegation was confirmed through investigation.[12] In addition, there is no binding requirement that the VA stop all action in connection

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[12] Indeed, if there were any good faith duty to disclose the allegation of forgery, it belonged to Oklahoma Mortgage Company, which originally received the information suggesting forgery and transmitted that information to the VA. Oklahoma Mortgage, the original lender, continued to act as service agent after it assigned the mortgage to respondent (App. C, *infra*, 31a). It is unclear from the record whether Oklahoma Mortgage in fact notified respondent of the allegation of forgery and, if not, why it failed to do so. See App. A, *infra*, 3a.

with a guaranty whenever it suspects forgery.[13] Thus, nothing the VA did or omitted to do in this case can be described as misconduct. This alone is sufficient to require reversal of the decision below.

Estoppel also is improper for the independent reason that there is a complete absence of any showing that respondent reasonably relied to its detriment on the VA's failure to disclose the possibility of forgery or on its actions in connection with the guaranty. The VA's longstanding regulation put respondent on notice that the agency would not be liable on its guaranty if it were discovered that a signature on the loan papers had been forged. By the time respondent received the assignment of the Durham mortgage, the Administrator had for many years interpreted the

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[13] Internal VA guidelines, found in Department of Veterans Benefits Manual M 26-4, ¶ 2.06(e) (Jan. 20, 1975), indicate that if the VA receives information suggesting a forgery, it should stop all activity in connection with the property (including payment for transfer of the property or payment of any claim on the guaranty) until a determination has been made concerning liability under the guaranty or until review by the VA Central Office. The VA's failure to adhere to these procedures was not cited by the courts below and would not warrant estoppel in any event. See *Schweiker* v. *Hansen*, *supra*, 450 U.S. at 789-790; cf. *United States* v. *Caceres*, 440 U.S. 741, 755-756 (1979). Moreover, VA compliance with the guidelines would not necessarily have benefited respondent. Under the guidelines, if the property had not been acquired at the time the VA learned of a possible forgery the agency would both have retained custody of the property and withheld all payments pending resolution of the forgery allegation.

The courts below appear to suggest at several points that the VA may have acted in violation of some of its published regulations. See App. A, *infra*, 6a, 8a; App. C, *infra*, 35a. Those suggestions apparently are based on a misreading of the cited regulations.

VA regulation to permit the agency to recover sums already paid out on a guaranty following proof of forgery. See page 13, note 9, *supra*. Thus, respondent —an experienced financial institution unquestionably familiar with VA-guaranteed mortgages—could not have harbored any reasonable expectation that it would be able to recover on the guaranty or retain payments already made if forgery were discovered.[14]

Finally, even if respondent reasonably could have relied on the VA's actions, it offered no evidence that it suffered detriment as a result. As Judge McKay observed (App. A, *infra*, 24a-26a), respondent already had elected to convey the property to the VA by the time the agency was informed of the allegation of forgery.[15] There is no reason to believe that respond-

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[14] See *Woodstock/Kenosha Health Center* v. *Schweiker*, Nos. 82-2375 and 82-2435 (7th Cir. July 19, 1983), slip op. 9-10 (it is particularly inappropriate "to apply the * * * equitable [estoppel] doctrine to protect skilled professionals operating in their area of expertise with the government on an intimate and long-term basis").

[15] The record does not show the precise date on which respondent elected to convey the property to the VA. However, VA regulations require a holder of a guaranty to make such an election within 15 days of the foreclosure sale. 38 C.F.R. 36.4320(a)(1). In this case, the foreclosure sale took place on January 28, 1975 (App. A, *infra*, 2a, 25a). Thus, respondent was required to make its election by February 12, 1975—almost two weeks before the VA was informed of the forgery allegation (*id.* at 25a).

In fact, the sheriff's deed to the property may already have been recorded in the name of the Administrator by the time the VA learned of the possible forgery. The stipulation of facts entered into by the parties in the district court states (at ¶ 11) that the sheriff's deed showing the Administrator as grantee of the property was recorded at 10:15 a.m. on

ent would have revoked its election or compelled return of the property if the VA had informed it of the allegation at the earliest possible time. And even if respondent could have obtained the return of the property, there was no proof that respondent would have been able to sell it for a higher price than respondent received from the VA (*id.* at 7a, 26a n.21).[16] Thus, to the extent respondent may have "relied" on the VA's actions, it did not suffer any tangible detriment as a result. In such circumstances, even estoppel against a private party would be entirely inappropriate.

This case illustrates well the lengths to which the lower courts have gone to avoid the principles set out in this Court's estoppel rulings. The courts below were willing to estop the government in a case that not only does not involve any government misconduct or reasonable detrimental reliance by the private party, but also lacks any real suggestion of unfairness to the private party. The basic question in this case is which party should bear the risk of loss resulting from forgery and default committed by third parties. Despite the facts that a longstanding, statutorily authorized, published regulation expressly relieves the government of liability and that respondent—a sophisticated financial institution—was in a position to avoid the risk of loss from forgery (*e.g.*, by agreement with the original lender or perhaps through purchase of insurance), the courts below found that the

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February 24, 1975. The VA was notified of the allegation of forgery on "approximately the same date" (App. A, *infra*, 2a, 11a; App. C, *infra*, 32a).

[16] Apparently there was no bid higher than the $30,000 respondent offered at the sheriff's sale on January 28, 1975.

government nevertheless should bear the loss. The readiness of the lower courts to impose unauthorized financial liability on the government under the rubric of estoppel is directly contrary to the teachings of this Court's decisions.

2. The estoppel issue presented by this case is important. The court of appeals' suggestion that payments, or other "affirmative actions," by a government agency suffice to estop the government from recovering erroneous payments (or, in the words of the court of appeals (App. A, *infra*, 7a), prevent an agency from "unravel[ing] the yarn") threatens to interfere with the smooth workings of numerous federal programs. Congress has created many funding programs involving grants, loans, guaranties, and other forms of financial assistance. The size and complexity of these programs make it inevitable that agencies sometimes will approve erroneous payments, and agencies are constantly in the process of conducting audits or investigations to determine whether various payments are proper. In the VA home loan guaranty program alone, there have been more than 500 investigations per year over the last few years. During such investigations agencies frequently take steps that could be characterized as "affirmative actions," such as payment, processing of an application, or some other activity that could lead beneficiaries to expect that they may receive or retain benefits. If the government could be estopped from recovering payments that are found to be inconsistent with a statute or regulation whenever it has taken such "affirmative actions," there would be a significant impact on the federal treasury. By the same token, if agencies were to withhold payments or other actions whenever an allegation of impropriety surfaced, the result

would harm program participants such as respondent, who might face substantial delays in recovering payments to which they are entitled.

As we have noted (see page 10, note 7), the decision below is not the only recent case in which the lower courts have disregarded this Court's estoppel rulings. In *Heckler* v. *Community Health Services*, No. 83-56 (filed July 14, 1983), we are seeking review of a decision of the United States Court of Appeals for the Third Circuit holding that the Secretary of Health and Human Services is estopped from recovering excess payments made to a provider of health care services under the Medicare program. Like *Community Health Services*, this case raises the question of estopping a federal agency from recovering payments made in contravention of a valid statute and regulation. The majority in this case purported to find an absence of guidance in this Court's estoppel decisions (App. A, *infra*, 3a), while Judge McKay characterized the subject of equitable estoppel of the government as a "confused area of law" (*id.* at 9a). If the Court grants certiorari in *Community Health Services*, it may well clarify the principles that confused the court below. Accordingly, we believe it would be appropriate for the Court to hold this case pending the disposition of *Community Health Services*.[17]

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[17] We are providing counsel for respondent with a copy of our petition in *Community Health Services*.

CONCLUSION

The petition for a writ of certiorari should be held pending disposition of the petition in *Heckler* v. *Community Health Services*, No. 83-56, and then disposed of as appropriate.

Respectfully submitted.

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AUGUST 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
No. 80-1987

HOME SAVINGS AND LOAN ASSOCIATION OF LAWTON, OKLAHOMA, PLAINTIFF-APPELLEE

v.

ROBERT P. NIMMO, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 78-1106-W)

[Filed Dec. 21, 1982]

Before SETH, McKAY and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This action was brought in state court against an official of the Veterans Administration, a federal agency, to recover on a loan guaranty certificate. The case was properly removed to federal court. 28 U.S.C. §§ 1346(a)(2) and 1361. After a non-jury

trial the district court rejected the government defense of forgery and gave judgment for the plaintiff. We affirm.

In April, 1971, Oklahoma Mortgage Company loaned Percy and Zelma Durham $34,000 on a residential property with the security of a note and mortgage. The loan was guaranteed by the Veterans Administration, VA, pursuant to 38 U.S.C. Chapter 37. The note, mortgage and guaranty were subsequently assigned to plaintiff-appellee, Home Savings and Loan Association. Because of defaults in payments, Home Savings, the assignee, brought foreclosure proceedings on July 12, 1974. Zelma Durham was personally served with process and made no claim that her signatures on the note and mortgage were forged. At the January 28, 1975, foreclosure sale, Home Savings bid in the property for $30,000, the amount VA had authorized it to bid. Pursuant to 38 C.F.R. §36.4320(a)(1), Home Savings exercised its option to convey the property to VA which received a sheriff's deed on February 24, 1975. On approximately the same date, Oklahoma Mortgage, the original lender, informed VA that Zelma's signatures on the note and mortgage might be forgeries. VA began an investigation but did not inform Home Savings, the assignee, of the forgery possibility or of the investigation. Home Savings submitted to VA a claim for $6,739.68 under the loan guaranty certificate. On April 4, 1975, VA paid Home Savings $30,000, the purchase price of the property at the foreclosure sale. On April 16, VA sold the property for $31,000. On October 16, VA paid Home Savings $6,733.19 under the guaranty. Twelve days later, VA demanded that Home Savings return the payment because the VA investigation had established that Zelma's signatures

were forged. VA also demanded that Home Savings pay it $1,055.44, as its loss because of expenses on the sale of the property. Home Savings paid VA the $6,733.19 which it had received under the loan guaranty but refused to pay the $1,055.44 claimed as a sale loss. VA then offset the latter amount against other amounts due Home Savings.

Home Savings brought this suit to recover both the $6,733.19 and $1,055.44 amounts. The trial court held that VA was estopped from asserting the defense of forgery because it had knowledge of the forgery when it accepted the sheriff's deed.

On this appeal VA contends that the district court improperly applied estoppel against the government. The VA guaranty is incontestable but the Administrator may assert defenses based on fraud, 38 U.S.C. § 1821, or forgery, 38 C.F.R. § 36.4325(a). The forgeries of Zelma's signatures were established at the trial and are not contested by Home Savings. VA learned of the possibility of forgeries from Oklahoma Mortgage Co., the original lender. No claim is made that Home Savings had any knowledge of the forgeries until advised by VA in October, 1975, long after the foreclosure sale, the VA reimbursement of Home Savings of the $30,000 paid at the sale, and the VA sale of the property for $31,000.

None of the Supreme Court decisions on estoppel against the government present facts having any similarity to those here. The most recent decision is Schweiker v. Hansen, 450 U.S. 785. The Court rejected the estoppel claim of an applicant for social security benefits. The Court held that an agency's field representative's erroneous statement and noncompliance with the agency's Field Manual did not estop the Secretary's denial of the claimed retroactive

benefits. In so doing the Court said, Id. at 788: "This Court has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations governing the distribution of welfare benefits."

In Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, the Court rejected an estoppel claim arising out of the acceptance by the corporation's agent of a crop insurance application which did not comply with an applicable regulation. The Court said hardship from innocent ignorance does not justify an estoppel claim and that the government's freedom from estoppel "merely expresses the duty of the courts to observe the conditions defined by Congress for charging the public treasury." Id. at 385.

INS v. Hibi, 414 U.S. 5, a naturalization case, denied an estoppel claim based on administrative failures of a federal agency. In so doing it quoted, Id. at 8, the statement in Utah Power & Light Co. v. United States, 243 U.S. 389, 409, that: "As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest . . . ." The qualifying phrase "general rule" would seem to leave the door slightly ajar.

Montana v. Kennedy, 366 U.S. 308, was a naturalization case where estoppel was based on the erroneous advice given by a consular officer. The Court held that the misconduct fell far short of that needed to estop the government. The Court recognized that "there may be circumstances in which the United States is estopped to deny citizenship because of the conduct of its officials." Id. at 315.

Several Tenth Circuit decisions discuss estoppel against the government. Atlantic Richfield Company

v. Hickel, 10 Cir., 432 F.2d 587, 591-592, involved royalties payable to the government under a federal oil and gas lease. Atlantic Richfield claimed estoppel on the basis of representations made by the Acting Director of the Geological Survey and acted on by it as lessee. The court held that the United States is not "estopped from asserting a lawful claim by the erroneous or unauthorized actions or statements of its agents or employees."

Albrechtsen v. Andrus, 10 Cir., 570 F.2d 906, 909-910, rejected a claim of estoppel based on laches and neglect of duty by officials in connection with a coal prospecting permit. United States v. Browning, 10 Cir., 630 F.2d 694, 702, says it is fundamental that the United States is not estopped by representation made without authority by a federal agent.

Sweeten v. United States Department of Agriculture Forest Service, 10 Cir., 684 F.2d 679, says that in a dispute over land boundaries, a private owner must show "affirmative misconduct by the government or its agents to establish estoppel." Id. at 682. In so holding the court relied on United States v. Ruby Co., 9 Cir., 588 Fd.2d 697, 703-704, cert. denied, 442 U.S. 917. Ruby relied on Santiago v. Immigration and Naturalization Service, 9 Cir., 526 F.2d 488, 491-493, which in turn relied on INS v. Hibi, supra, 414 U.S. 5, 8.

In Schweiker v. Hansen, supra, 450 U.S. at 788-789, n. 4, the Court referred to cases in which federal courts have applied estoppel against the government and distinguished them on the facts. None of the above mentioned cases rejecting estoppel against the government relate to facts comparable to those presented in the instant case.

In the situation before us, the government, through VA, engaged in a commercial transaction pursuant

to 38 U.S.C. § 1810, authorizing guaranty of loans to veterans for the purchase of homes. Oklahoma Mortgage made the loan and received the VA guaranty. It then assigned the loan and the VA guaranty to Home Savings. After default, Home Savings admittedly complied with VA procedures for foreclosure. VA knew of the suspected forgery when it accepted the sheriff's deed and paid Home Savings $30,000.

The parties agree that the district court correctly stated the tests for estoppel. They are:

(1)—The party to be estopped must know the facts.

(2)—He must intend that his conduct will be acted on or must so act that the party asserting the estoppel has the right to believe that it was so intended.

(3)—The latter must be ignorant of the true facts.

(4)—He must rely on the former's conduct to his injury.

Before discussing these elements we note that 38 C.F.R. § 36.4325(a), says that there is no liability on a loan guaranty when the loan papers are forged but its subsection (1) excepts a holder in due course without knowledge. Two decisions have held that forgery is a defense against a holder "even though that person is innocent of any wrong doing." Century Federal Savings and Loan Association v. Roundebush [*sic*], 1 Cir., 618 F.2d 969, 972, and Mt. Vernon Cooperative Bank v. Gleason, 2 Cir., 367 F.2d 289, 292. Neither of those cases involved estoppel.

At the time of the foreclosure proceedings, the acquisition of the property by VA, and the payment by VA to Home Savings of $30,000 for the property, VA knew, but did not disclose to Home Savings, the possibility of forgery. Failure to disclose is inaction.

The VA acceptance of the sheriff's deed and its payment of $30,000 to Home Savings are affirmative actions. Home Savings was entitled to rely on and to treat the transaction as an accomplished fact. VA now seeks to take advantage of its discovery, many months later, that Zelma's signatures were forged. Then, it was too late to unravel the yarn. VA had both acquired and sold the property.

No harm has occurred to the fiscal policies of the United States. The VA has recourse against the borrowing veteran. See United States v. Shimer, 367 U.S. 374, 386. The VA had authority to do what it did and did not deprive the public of any statutory protection. See Semaan v. Mumford, D.C.Cir., 335 F.2d 704, 706, n. 6, Smale & Robinson, Inc. v. United States, S.D.Calif., 123 F.Supp. 457, 464-466.

By its affirmative acts, VA acquired and sold the property without disclosure to Home Savings of the forgery possibility. Home Savings complied with the VA regulations and relied on its acts. We are convinced that the first three estoppel tests are satisfied. The question of injury remains for discussion.

Home Savings argues that, if it had known of the forgery possibility and the complications incident thereto, it could have retained the property and sold it at a profit. The only mention of value in the record is the VA appraisal of $32,000. Home Savings presented no evidence of market value. The lost profit claim is speculative. Speculation does not suffice to prove injury.

The exact date of VA's knowledge of the forgery of Zelma's signatures does not appear in the record. On March 28, 1975, before the sale of the property by VA, Home Savings submitted its claim for reimbursement under the VA loan guaranty in the

amount of $6,739.68, later reduced to $6,733.19. On October 16, 1975, VA issued a treasury check to Home Savings for that amount. The government brief says, p. 3: "Shortly before the Guaranty Claim was paid, the Veterans Administration determined that Mrs. Durham's signature was in fact a forgery." On October 28, VA demanded that Home Savings return the guaranty payment and it did so. The question then is whether the loss of the loan guaranty is an injury. By its affirmative acts from the inception of the foreclosure suit and until after the guaranty payment, VA led Home Savings to rely on its compliance with VA regulations. VA does not claim that Home Savings failed to comply with any applicable regulation. The acts of VA were inconsistent with denial of the validity of the original loan transaction. VA is estopped from denying that validity. Home Savings is entitled to payment of the loan guaranty.

The situation with regard to the $1,055 sale expense presents another problem. VA acted in violation of its own regulations in assessing the sale costs against Home Savings. With narrow exceptions, not here applicable, the responsibilities of Home Savings ceased upon acceptance of the property by VA. See 38 C.F.R. § 36.4320(h)(6), (7), (8), (9), and (10). The collection of the $1,055 from Home Savings by exercise of a set off is a compensable injury. VA is estopped from asserting otherwise.

The trial court awarded pre-judgment interest to Home Savings. VA's opening brief attacks that award. Its reply brief withdraws that attack.

Affirmed.

McKAY, Circuit Judge, dissenting:

In a dispute over the payment of a home loan subsidy, the majority invokes equitable principles to estop the Veterans Administration from asserting a congressionally authorized forgery defense. Relying on factual dissimilarities, the majority attempts to distinguish past Supreme Court decisions that have consistently sheltered the government from equitable estoppel.[1] I believe that the majority's distinctions will prove to be chimerical rather than precedential and will introduce new contradictions into an already confused area of law.[2] Moreover, I believe that the majority's approach diverts attention from the fundamental principles that underlie doctrines of equity. Only through an inquiry into the relationship between the government and private entities, and an analysis of the proper exercise of judicial power, will a coherent theory of equitable estoppel of the government emerge. For these reasons, I respectfully dissent.

I.

The district court's findings of fact are, in essence, as follows: In April 1971, the Veterans Ad-

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[1] *See* Schweiker v. Hansen, 450 U.S. 785 (1981) (per curiam); INS v. Hibi, 414 U.S. 5 (1973) (per curiam); Montana v. Kennedy, 366 U.S. 308 (1961); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917).

[2] As Justice Marshall recently noted, the question of when the government may be equitably estopped has been the subject of "considerable ferment," dividing panels and generating inconsistencies throughout the courts of appeals. Schweiker v. Hansen, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). *See generally* Note, *Equitable Estoppel of the Government*, 79 Colum. L. Rev. 551 (1979).

ministration (VA) guaranteed a $34,000 home loan by issuing a loan guaranty certificate to the lender and mortgagee, Oklahoma Mortgage Company, Inc. (Oklahoma Mortgage). Oklahoma Mortgage assigned the note, mortgage, and the loan guaranty certificate to Home Savings and Loan Association (Home Savings). Several years later, the borrowers defaulted, Home Savings brought a successful foreclosure suit, and the sheriff offered the mortgaged property for sale. In accordance with the VA's loan guaranty regulations governing the "sale of security," [3] the VA specified that a minimum of $30,000 would be credited to the indebtedness of the borrower on account of the value of the security sold. Home Savings successfully bid that amount for the property at the sheriff's sale, retaining its option to resell the property to the VA.[4] Home Savings eventually did choose

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[3] The pertinent regulation of the Veterans Administration provides in part as follows:

> Upon receipt by the Administrator of notice of a judicial or statutory sale, or other public sale under power of sale contained in the loan instruments, to liquidate any security for a guaranteed or insured loan, he may specify in advance of such sale the minimum amount which shall be credited to the indebtedness of the borrower on account of the value of the security to be sold, subject to the provisions of paragraphs (a)(1), (2), (3) and (4) of this section . . . .

38 C.F.R. § 36.4320(a) (1981). The relevant portions of the VA regulations have remained unchanged since 1975. *See* 36 Fed. Reg. 320 (1971); 40 Fed. Reg. 34591 (1975).

[4] If the holder of a VA guaranteed home loan purchases the mortgaged property at a price not in excess of the amount the VA has specified as credited toward indebtedness, then

to convey the property to the VA for the specified amount of $30,000, and on February 24, 1975, the VA received a sheriff's deed pursuant to the order of Home Savings. On approximately this same date, the VA obtained knowledge through Oklahoma Mortgage that the signature of a borrower, Zelma R. Durham, was allegedly forged on the note and mortgage. Under VA regulations promulgated by authority of Congress, the VA incurs no liability on account of a loan guaranty if a signature in the loan papers is forged.[5] Consequently, the VA began an

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the holder may convey the property to the VA. The pertinent regulation provides as follows:

> If a minimum amount for credit to the indebtedness has been specified in relation to a sale of real property and the holder is the successful bidder at the sale for an amount not in excess of such specified amount the holder shall credit to the indebtedness the amount so specified. The holder thereupon may retain the property or not later than 15 days after the date of sale advise the Administrator of his election to convey or transfer the property, or the rights thereto derived through the sale, to the Administrator.

38 C.F.R. § 36.4320(a)(1) (1981). The amount paid by the Administrator will generally be the amount he previously specified as credited toward indebtedness. *See* 38 C.F.R. § 36.4320(g) (1981).

[5] In the Veterans' Benefits Act, Pub. L. No. 85-857, 72 Stat. 1105 (1958) (as amended), Congress provided as follows:

> Any evidence of guaranty or insurance issued by the Administrator shall be conclusive evidence of the eligibility of the loan for guaranty or insurance under the provisions of this chapter and of the amount of such guaranty or insurance. Nothing in this section shall preclude the Administrator from establishing, as against the original lender, defenses based on fraud or material misrepresentation. The Administrator shall not, by reason

investigation into the alleged forgery, but it did not notify Home Savings of the allegations or the investigation. During the investigation, the VA processed Home Savings' claim for reimbursement on the losses incurred on the loan, and paid Home Savings the full amount of the claim, $6,733.19. However, in October 1975, the VA requested that Home Savings return this sum. The VA eventually denied Home Savings' claim for reimbursement, concluding that the signatures of Zelma Durham were indeed forgeries that nullified the loan guaranty obligation.

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of anything contained in this section, be barred from establishing, by regulations in force at the date of such issuance or disbursement, whichever is the earlier, partial defenses to the amount payable on the guaranty or insurance.

38 U.S.C. § 1821 (1976). Pursuant to this authorization, the Administrator retained loan guarantee regulations originally promulgated under similar statutory authority in the Serviceman's Readjustment Act of 1944, 58 Stat. 284. The pertinent regulation provides as follows:

> Subject to the incontestable provisions of 38 U.S.C. 1821 as to loans guaranteed or insured on or subsequent to July 1, 1948, there shall be no liability on account of a guaranty or insurance, or any certificate or other evidence thereof, with respect to a transaction in which a signature to the note, the mortgage, or any other loan papers, or the application for guaranty or insurance is a forgery; or in which the certificate of discharge or the certificate of eligibility is counterfeited, or falsified, or is not issued by the Government.

38 C.F.R. § 36.4325(a) (1981). The Court of Appeals for the Second Circuit has held that this regulation precludes liability under a VA loan guarantee to assignees of the mortgage, as well as original lenders, if a mortgagor's signature is forged. Century Federal Savings & Loan Association v. Roudebush, 618 F.2d 969 (2d Cir. 1980).

On the basis of these findings of fact, the district court ruled that, notwithstanding the forgery in the loan papers, the VA was obligated to Home Savings under the terms of the loan guaranty. The court held that the VA was equitably estopped from asserting the forgery defense, concluding that by accepting the sheriff's deed to the mortgaged property, and by failing to notify Home Savings of the forgery allegations, the VA induced a justifiable reliance by Home Savings that the loan guaranty claim would be honored.

II.

The majority of this panel agrees with the district court that the VA is equitably estopped from asserting the forgery defense. The majority opinion reviews cases from the Supreme Court[6] and the Tenth Circuit[7] and concludes that "[n]one of the above mentioned cases rejecting estoppel against the government relate to facts comparable to those presented in the instant case." *Ante* at 5a. The majority suggests that the instant case involves a "commercial transaction," *ante* at 5a, and is therefore distinguishable from precedent denying equitable estoppel of the government.

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[6] *See* Schweiker v. Hansen, 450 U.S. 785 (1981) (per curiam); INS v. Hibi, 414 U.S. 5 (1973) (per curiam); Montana v. Kennedy, 366 U.S. 308 (1961); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917).

[7] *See* Sweeten v. Department of Agriculture Forest Service, 684 F.2d 679 (10th Cir. 1982); United States v. Browning, 630 F.2d 694 (10th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981); Albrechtsen v. Andrus, 570 F.2d 906 (10th Cir.), *cert. denied*, 439 U.S. 818 (1978); Atlantic Richfield Co. v. Hickel, 432 F.2d 587 (10th Cir. 1970).

Initially, I state my belief that it is insufficient to distinguish Home Savings' claim on the basis that it involves a commercial transaction, without offering some explanation of the relevance of this distinction. As Justice Marshall has noted, it only adds confusion to the already unsettled area of estoppel to delineate factual distinctions without elaborating why or how these distinctions affect the legal question involved. *Schweiker* v. *Hansen*, 450 U.S. 785, 792-93 (1981) (Marshall, J. dissenting).

I assume that the majority considers "commercial transactions" distinguishable from other government undertakings because such transactions are in some sense "proprietary" functions.[8] However, even assuming that this ground for distinction finds support in law, I do not believe that the loan guaranty can properly be characterized as a proprietary commercial transaction for purposes of applying equitable estoppel against the government. The loan guaranty

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[8] Lower federal courts have occasionally applied equitable estoppel against the government in situations where the government acts in a "proprietary capacity." *See* United States v. Georgia-Pacific Co., 421 F.2d 92, 100-01 & n.17 (9th Cir. 1970). *See generally* Note, *Equitable Estoppel Against the Government*, 79 Colum. L. Rev. 551, 555-57 (1979). The distinction typically is based on the rationale that the government's immunity from estoppel is an attribute of sovereignty, and therefore the government retains its immunity only so long as it acts in a sovereign capacity. *Id.* However, the Supreme Court has accepted neither the proprietary distinction nor its rationale. *Id.* at 557. Indeed, the Court has said in dicta that "the Federal Government performs no 'proprietary' functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed." Federal Land Bank v. Board of County Comm'rs., 368 U.S. 146, 150-51 (1961) (footnote omitted).

program is a government entitlement to veterans, *see* 38 U.S.C. § 1802 (1976), providing public assistance to those who have discharged a patriotic service to the country. Admittedly, the program relies on commercial institutions, such as savings and loan associations, and conventional instruments of commerce, such as loan guaranties, to accomplish its goals. However, the use of commercial institutions and instruments of commerce does not alter the essential character of the loan guaranty program; the program remains a subsidy in support of a public policy objective. Nor does the use of commercial institutions and instruments transform the government into simply "another private litigant" for purposes of equitable estoppel. Indeed, in *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1948), the Supreme Court rejected such contentions, concluding that the Government's issuance of crop insurance to farmers through a federally chartered corporation could not be characterized as an ordinary commercial undertaking for the purposes of equitable estoppel.[9] 332 U.S. at 383-84 & n.1. I perceive no differences between the loan guaranty program for veterans and the crop insurance program for farmers that can place the former beyond *Merrill's* embrace.[10]

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[9] The Court specifically stated that "[g]overnment is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it." 332 U.S. at 383-84.

[10] In particular, I believe that it is irrelevant that the holder of the note, rather than the veteran, asserts estoppel. Both are participants in the government's loan guaranty program. The broad reach of *Merrill* precludes the possibility that a program can have a sovereign character with respect to some participants, and a proprietary character with respect to others. *See supra* note 9.

The majority's "commercial transaction" distinction is untenable, given the nature of the VA's loan guaranty program and the reasoning of *Merrill*. Furthermore, I anticipate that the disinction will be difficult to apply. I suspect that today's adoption of this standard inaugurates a procession of future cases that will be distinguished on the basis of "finespun and capricious" characterizations. *See Indian Towing Co.* v. *United States*, 350 U.S. 61, 68 (1955). Consequently, I decline to follow the majority's avenue of analysis and instead offer my own approach.

III.

A court exercises its power of equitable estoppel to prevent a litigant from asserting claims or defenses that arise as a result of the litigant's own wrongdoing. The elements of equitable estoppel are described in various formulas,[11] all of which essentially require a showing of misleading conduct by one party that results in reasonable, detrimental reliance by another.

Litigants persistently have attempted to invoke the doctrine of equitable estoppel against the government,

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[11] For example, in Sweeten v. Department of Agriculture Forest Service, 684 F.2d 679 (10th Cir. 1982), the court set out the following elements:

> (1) The party to be estopped must know the facts; (2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) The latter must be ignorant of the true facts; and (4) He must rely on the former's conduct to his injury.

684 F.2d at 682 n.5. A similar six-part formulation is found in 3 P. Pomeroy, Equity Jurisprudence, § 805, at 191-92 (5th ed. Symons 1941).

and have generated confusion and controversy in the process. When faced with the issue, the Supreme Court has repeatedly refused to estop the government, but has declined to provide guidance beyond the facts presented in each case. *See, e.g., INS* v. *Miranda*, 51 U.S.L.W. 3358 (U.S. Nov. 8, 1982) (per curiam); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (per curiam); *INS* v. *Hibi*, 414 U.S. 5 (1973) (per curiam). In response, lower courts have continued to apply equitable estoppel against the government, but have required a showing of additional elements or facts beyond those required for application of equitable estoppel against a private party. *See, e.g., Meister Bros. Inc.* v. *Macy*, 674 F.2d 1174 (7th Cir. 1982); *Portmann* v. *United States*, 674 F.2d 1155 (7th Cir. 1982). As a result, a plethora of tests have emerged for applying equitable estoppel against the government, none of which has been approved by the Supreme Court.[12]

I believe that this search by the lower courts for a talismanic test has resulted in a departure from the fundamental inquiries that underlie the doctrine of equitable estoppel. Whether a case involves the gov-

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[12] For example, recent tests have included distinctions between reliance on misrepresentations of procedural rather than substantive rules, Hansen v. Harris, 619 F.2d 942 (2d Cir. 1980), *rev'd sub nom.* Schweiker v. Hansen, 450 U.S. 785 (1981) (per curiam); between applications of estoppel that do and do not impact the public treasury, Miranda v. INS, 673 F.2d 1105 (9th Cir. 1982), *rev'd*, 51 U.S.L.W. 3358 (Nov. 8, 1981) (per curiam); and between sovereign and proprietary activities of the government, *see* Portmann v. United States, 674 F.2d 1155, 1167-69 (7th Cir. 1982) (treating the U.S. Postal Service as a "quasi-private" entity). A variety of other tests have been suggested as well over the years. *See generally* Note, *Equitable Estoppel of the Government*, 79 Colum. L. Rev. 551 (1979).

ernment or whether it involves private parties, the same two general questions inevitably arise: (1) did misleading conduct induce reasonable detrimental reliance? and, (2) are there nevertheless circumstances that caution the court to withhold the exercise of its equitable powers? The various proposed tests for asserting equitable estoppel against the government, including the "commercial transaction" distinction used by the majority, have diverted attention from a reasoned analysis of these inquiries, blurring the distinctions between the two questions and confounding the identification of relevant factors.

The preliminary question, whether misleading conduct has induced reasonable reliance, must be answered in light of the duties and expectations between the parties. The question remains the same whether estoppel is asserted against the government or against a private actor. However, the underlying duties and expectations that inform the inquiry may depend on the identity of the parties. In particular, dealings with the government do not necessarily support the same duties and expectations as dealings between private parties.[13] Accordingly, the allegedly

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[13] The government typically acts through congressionally created agencies whose conduct is governed by statutes and regulations and, at the outer perimeter, by the Constitution. The content of the governing law shapes the duties of the agency in its dealings with private parties and the expectations of the parties in their dealings with the government. Although the governing law may subject the agencies to the same burdens as private parties, *see, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 2674 (1976) (subjecting United States to tort liability "in the same manner and to the same extent as a private individual under like circumstances . . . ."), there is no inherent requirement that it do so. *See* 28 U.S.C. § 2680 (1976) (exempting various governmental agencies from the Federal Torts Claims Act).

misleading character of governmental conduct, as well as the reasonableness of reliance on that conduct, must be evaluated in light of duties and expectations properly attributable to the government. Of primary relevance to this evaluation are the constitutional, statutory and regulatory provisions controlling the government's conduct, interpreted in light of the nature of the government's activities and the identity of the private party.[14]

By comparison, the question of whether a court should withhold the exercise of equitable powers implicates different concerns. The courts have defined limits to the use of equitable remedies based on considerations of fairness and the proper exercise of judicial power. *See generally* D. Dobbs, Remedies 45-65 (1973). In cases involving private parties, such considerations are reflected in the application of general principles such as the "clean hands" requirement, *Precision Instrument Manufacturing Co.* v. *Automotive Maintenance Machine Co.*, 324 U.S. 806, 814 (1945), and, more generally, the promotion of the "ends of justice", *Dickerson* v. *Colgrove*, 100 U.S. 578, 580 (1880). However, when estoppel is asserted against the government, an additional consideration arises, that of the court's relationship with the coordinate branches of government. In particular, the separation of powers doctrine may instruct courts that, absent exceptional circumstances, they

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[14] I specifically note that the issue of whether the government engaged in "affirmative misconduct" is not relevant to this inquiry, since this characterization of the government's conduct does not relate to whether the conduct was misleading, or whether the conduct induced reliance. Instead, I believe the "affirmative misconduct" characterization is relevant to the second inquiry, whether the court should exercise its equitable powers. *See infra* note 17.

should withhold the imposition of equitable estoppel against the government if the estoppel would frustrate the purpose of valid statutes expressing the will of Congress.

I believe that the Supreme Court's decisions regarding equitable estoppel of the government can be harmonized and understood by separating these two inquiries. The per curiam decisions in *INS* v. *Miranda*, 51 U.S.L.W. 3358 (U.S. Nov. 8, 1982) and *INS* v. *Hibi*, 414 U.S. 5 (1973), and the decision in *Montana* v. *Kennedy*, 366 U.S. 308 (1961) seem to be decided on the basis of the initial inquiry, whether misleading conduct induced reasonable reliance. In both *Miranda* and *Hibi*, the Court's opinions suggest that the conduct of the INS was simply not misleading.[16] In *Montana*, the Court admitted that while the

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[16] In *Miranda*, an alien who married a citizen claimed that the INS was estopped from denying his application for permanent residence status because of "unreasonable delay" by the INS in processing his application. During the processing period his marriage dissolved, and his eligibility for a change in status ended. The Court declined to conclude that the delay was unwarranted, given the responsibility of the INS to fully investigate applications. 51 U.S.L.W. at 3359 & n.4. In *Hibi*, the Court concluded that failure to publish fully the naturalization rights of aliens who served in the United States Armed Forces and to provide an authorized naturalization representative overseas was not conduct that would give rise to an estoppel against the government. 414 U.S. at 8-9. A dissenting opinion in *Hibi* suggested that the failure to provide a naturalization representative was an attempt by the Executive Branch to deny aliens their right to naturalization. 414 U.S. at 11 (Douglas, J. dissenting). However, the Court did not discuss this assertion and apparently determined that the INS acted within the constitutional, statutory and regulatory provisions governing its operation. Thus, both *Miranda* and *Hibi* seem to be cases where the government's conduct conformed with the duties and obligations set forth by law and consequently was not misleading.

action of the government could have been misleading, it could not have induced reasonable reliance.[16] Since in these cases the basic requisites for equitable estoppel had not been met, there was no need to reach the second inquiry of whether the lower court should have exercised its equitable powers to estop the government.

Other Supreme Court decisions, *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (per curiam) and *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947), seem to rest on this second inquiry. In these cases, the Court did not contest the claims that the government engaged in misleading conduct and induced reasonable reliance. Instead, the Court observed that a party's reliance on unauthorized or even erroneous statements of agents of the government concerning eligibility for public entitlements does not provide grounds for a court to abnegate its duty to observe the conditions provided by Congress for charging the public treasury. *See Schweiker*, 450 U.S. at 788-89; *Merrill*, 332 U.S. at 385. Thus, in these cases the Court has clearly recognized the separation of powers doctrine as a ground for limiting the exercise of equitable estoppel against the government, at least in situations where unauthorized statements of government agents threaten to charge the treasury. The doctrine may limit the use of estoppel against the government in other situations as well. The Supreme

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[16] In *Montana*, an alien claimed that the United States was estopped to deny him citizenship because the American Consular Office refused to issue his mother a passport to the United States before his birth. The Court noted that the United States did not require his mother to have a passport to return to the country at that time. 366 U.S. at 314. Since no passport was needed, the alien's mother could not have reasonably relied on the refusal to issue the passport in deciding not to return to the United States.

Court has recently noted that lower courts should withhold estoppel in matters, such as naturalization, that do not involve the public fisc, but nevertheless, involve congressional policies "implicating broad public concern." *Miranda*, 51 U.S.L.W. at 3359. Despite the broad reach of this language, the Supreme Court has also indicated that the barrier to equitable estoppel provided by the separation of powers doctrine is not absolute. The Court has repeatedly recognized that, notwithstanding the resulting interference with congressional prerogatives, equitable estoppel of the government could be permissible in exceptional circumstances, such as affirmative misconduct by agents of the government.[17] *Miranda*, 51 U.S.L.W. at 3359; *Schweiker*, 450 U.S. at 788; *Hibi*, 414 U.S. at 8; *Montana*, 366 U.S. at 314-15. The Court thus recognizes that some circumstances may implicate interests of sufficient importance to override the barriers to estoppel imposed by the sepaartion of powers doctrine. Indeed, this recognition is consistent with the "pragmatic, flexible approach" that the Court has employed in resolving clashes between coordinate branches of government. *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 442 (1977).

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[17] Although the Supreme Court has cited affirmative misconduct as providing a potential ground for imposing equitable estoppel against the government, it has not explained the relevance of this factor. In my understanding, affirmative misconduct is relevant because the executive branch has a responsibility to prevent government agents from engaging in intentional, reckless, or grossly negligent misconduct. The failure of the executive branch to prevent such misconduct provides grounds for the courts to surmount the separation of powers barrier and impose equitable estoppel. It is in that light that I understand this court's adoption of the affirmative misconduct standard in Sweeten v. Department of Agriculture Forest Service, 684 F.2d 679 (10th Cir. 1982).

The Supreme Court cases thus reflect the following state of law with respect to equitable estoppel of the government. At a minimum, a party asserting estoppel must show misleading conduct that induced reasonable detrimental reliance, taking into account the duties, obligations, and expectations that flow from its relationship with the government. Where this reliance is based on an unauthorized act of a government agent, the court should withhold imposition of estoppel if it would result in charging the public treasury against the will of Congress. Furthermore, the separation of powers doctrine may require courts to withhold estoppel in other situations as well. Nevertheless, equitable estoppel of the government may be permissible, notwithstanding its threat to the goals of Congress, in exceptional circumstances, such as affirmative misconduct of the government.

This perspective on the state of the law informs my view of the proper resolution of the case now before this court.

IV.

Home Savings claims that the VA should be equitably estopped from asserting its forgery defense because the VA failed to notify Home Savings of the forgery allegations at the time that they arose. Home Savings claims that the failure to provide notification misled it into believing that its claim under a VA loan guaranty would be honored. Thus, the first inquiry, as discussed above, is whether the VA truly engaged in misleading conduct that induced reasonable detrimental reliance by Home Savings, given the duties and expectations between the parties.

Home Savings points to the VA's silence in the face of suspicion of forgery as the source of mislead-

ing conduct. Indeed, courts have long held that silence can serve as the basis of misleading conduct justifying equitable estoppel, but only if the silent party had a duty to speak. *See, e.g., Unity Banking & Savings Co.* v. *Bettman*, 217 U.S. 127 (1910); *Codell* v. *American Surety*, 149 F.2d 854 (6th Cir. 1945). Home Savings cites no legally imposed duty in the statutes and regulations which govern the VA, or in the Constitution, that requires notification of loan guaranty holders when the VA receives allegations that signatures in the loan papers are forged. Instead, Home Savings apparently believes that under some general principle of good faith,[18] the VA is obligated to disclose its suspicions of forgery prior to the completion of a conclusive investigation.

I would hesitate to rely on bare notions of good faith, completely detached from constitutional and statutory requirements, to impose such a far-reaching duty on a government agency.[19] But even assuming

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[18] *Cf.* Columbia Broadcast System, Inc. v. Stokely-Van Camp, Inc., 522 F.2d 369, 378 (2d Cir. 1975) (under New York law of estoppel, the duty of a private party to disclose information may be founded on principles of ethics and good faith).

[19] The Supreme Court has suggested in dicta that the government is subject to general principles of "good faith," saying, "[a] citizen has the right to expect fair dealing from his government." S & E Contractors, Inc. v. United States, 406 U.S. 1, 10 (1972). However, this statement seems simply to suggest that government agencies must act within the sphere of authority provided by statute. In *S & E Contractors*, the Atomic Energy Commission (AEC) resolved a contract dispute with a private party according to the terms specified in the contract. The General Accounting Office (GAO) overturned the AEC's resolution, and the private party challenged the GAO action. The Supreme Court ruled

that this duty of disclosure existed, the VA's silence cannot be considered misleading since Home Savings apparently elected to convey the property before the VA received the forgery allegations. The facts, as found by the district court, indicate that Home Savings purchased the mortgage property at the sheriff's sale on January 28, 1975. Under VA regulations, Home Savings had 15 days, until February 12, 1975, in which to advise the VA of its election to convey the property to the VA. *See* 38 C.F.R. § 36.4320(a)(1). The VA did not receive the forgery allegations until on or about February 24, 1975, almost two weeks after the deadline for Home Savings to exercise its option to convey. Thus, at the time that Home Savings was required to make its election to convey the property,[20] the VA had no knowledge of the forgery allegations. Home Savings can hardly claim that the VA, through its silence, engaged in misleading conduct, since the VA had no reason at this time to suspect forgery. Likewise, Home Savings cannot claim that the VA engaged in misleading conduct by its failure to provide notice of the forgery allega-

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that Congress had delegated authority to the AEC to resolve the contract dispute and that the GAO had no power to interfere. 406 U.S. at 19.

[20] The scant record in this case does not indicate on what date the election to convey was actually made. As the party asserting estoppel, Home Savings bore the burden of showing misleading conduct and reasonable reliance. *See, e.g.*, Tom W. Carpenter Equip. Co. v. General Elec. Credit Corp., 417 F.2d 988, 990 (10th Cir. 1969). Hence, Home Savings had to prove that the VA was apprised of the forgery allegations at the time Home Savings elected to convey the property. In the absence of evidence to the contrary from Home Savings, it should be presumed that Home Savings complied with the regulatory requirement and elected to convey the property within the fifteen day time deadline.

tions on the day that it received them. By that time, Home Savings had already elected to convey the property to the VA.

Since the VA did not engage in misleading conduct, there is no reason to determine the two remaining components of the first inquiry; namely, whether Home Savings' reliance was reasonable, and whether it resulted in a detriment.[21] Likewise, there is no reason to proceed to the second inquiry, whether the court should withhold the exercise of its equitable powers. Indeed, given the constitutional implications of applying equitable estoppel against a coordinate branch of government, a court should proceed with this inquiry only if it is necessary to resolve the case before it.

V.

Home Savings has failed to demonstrate a basic requisite for equitable estoppel and, accordingly, its claim to estoppel should be denied. The majority simply overlooks this fact, and in the process determines that the government is subject to equitable estoppel because it engaged in a "commercial transaction." The commercial transaction distinction is untenable under the facts of this case, is inconsistent with Supreme Court precedent, and introduces a troublesome concept into our law. Under these circumstances, I am compelled to respectfully dissent.

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[21] I note in passing that Home Savings' claim of detriment seems purely speculative. As the majority notes, Home Savings introduced no evidence that if it retained the property it could have sold it for more than it received from the VA.

APPENDIX B

MARCH TERM—April 25, 1983

Before Honorable Oliver Seth, Honorable Jean S. Breitenstein, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

No. 80-1987

HOME SAVINGS AND LOAN ASSOCIATION OF LAWTON, OKLAHOMA, PLAINTIFF-APPELLEE

vs.

AMERICAN FIRST TITLE AND TRUST COMPANY, a Corporation, and OKLAHOMA MORTGAGE COMPANY, INC., a Corporation, DEFENDANTS

ROBERT P. NIMMO, Administrator of the Veterans Administration, DEFENDANT-APPELLANT

The court, in order to correct a clerical error in the issuance of this order on April 21, 1983, reissues the order nunc pro tunc to read as follows:

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing in banc filed by respondent in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submit-

ted, and the court having been polled on rehearing in banc, and a vote having been taken, the suggestion for rehearing in banc is denied. Circuit Judges McKay, Logan and Seymour voted to grant rehearing in banc.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

MARCH TERM—April 21, 1983

Before Honorable Oliver Seth, Honorable Jean S. Breitenstein, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

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HOME SAVINGS AND LOAN ASSOCIATION OF LAWTON, OKLAHOMA, PLAINTIFF-APPELLEE

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ROBERT P. NIMMO, Administrator of the Veterans Administration, DEFENDANT-APPELLANT

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing in banc filed by respondent in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-78-1106-W

HOME SAVINGS & LOAN ASSOCIATION OF LAWTON, OKLAHOMA, PLAINTIFF

vs.

AMERICAN FIRST TITLE & TRUST COMPANY, OKLAHOMA MORTGAGE COMPANY, INC., MAX CLELAND ADMINISTRATOR OF THE VETERANS ADMINISTRATION, DEFENDANTS

[Filed Jul. 22, 1980]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before LEE R. WEST, United States District Judge.

MEMORANDUM OPINION

This is an action for judgment for a loan guaranty claim. The case was pretried to the Court on May 8, 1980. The case was tried to the Court, sitting without a jury, on June 11, 1980. Having benefit of trial briefs, supplemental briefs, and proposed findings of fact and conclusions of law by the parties, and having heard the evidence and the arguments of counsel, the Court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

This case originally arose out of a default on a mortgage note upon which the Veterans Administra-

tion had issued a Loan Guaranty Certificate. The events that transpired are basically not in dispute, and are summarized as follows.

On April 7, 1971, a Joint Tenancy Warranty Deed was recorded in the Oklahoma County Clerk's Office showing Percy L. and Zelma R. Durham as owners of the property in question. Also on April 7, 1971, a $34,000.00 Mortgage was recorded showing Percy L. and Zelma R. Durham as mortgagors of the property and Oklahoma Mortgage Company, Inc. (herein Oklahoma Mortgage) as mortgagee. Thereafter the Veterans Administration duly issued its Loan Guaranty Certificate, dated April 27, 1971, to Oklahoma Mortgage. The Note, Mortgage, and Loan Guaranty Certificate were assigned to Plaintiff Home Savings and Loan Association of Lawton, Oklahoma (herein Home Savings) by assignment dated April 20, 1971 and recorded on April 23, 1971. At the time of the assignment of the Mortgage and Note, Oklahoma Mortgage represented to Home Savings that the loan was a fully guaranteed loan under the Servicemen's Readjustment Act of 1944, administered through the Veterans Administration. Oklahoma Mortgage further represented to Home Savings that in the event a default should occur under the terms of the Note and Mortgage, which default resulted in the foreclosure of the premises covered by the Mortgage, that Home Savings would be compensated to the full extent provided under the terms of the Loan Guaranty issued pursuant to the Servicemen's Readjustment Act of 1944. Oklahoma Mortgage, upon transferring the loan to Home Savings undertook to act as service agent for Home Savings. American First Title and Trust Company (herein American First) thereafter issued to Oklahoma a Title Guaranty Policy, under the terms of which American First insured the holder

and owner of the Mortgage in issue against loss by reason of forgery. On or about March 1, 1974, the mortgagors, Percy L. and Zelma R. Durham, defaulted on the Note and Mortgage, and a foreclosure suit was instituted by Home Savings on July 12, 1974 in a case filed in Oklahoma County District Court. The co-mortgagor, Zelma R. Durham, was personally served with process. On or about December 6, 1974, a Journal Entry of Judgment was entered in the case by the District Court which effectively quited [*sic*] title to the property. Specifically the Journal Entry read:

> "The Court further finds that the Defendants and original mortgagors, Percy L. Durham and Zelma R. Durham, husband and wife, made, executed and delivered the Note and Mortgage sued upon by the Plaintiff [Home Savings], and that said Plaintiff is the owner and holder thereof by assignment of record."

The property was then sold by the sheriff of Oklahoma County, with appraisement, to Home Savings on January 28, 1975, pursuant to special execution in Order of Sale for the sum of $30,000.00, the amount the Veterans Administration authorized Home Savings to bid. On or about February 24, 1975, the Veterans Administration received a Sheriff's Deed pursuant to the order of Home Savings. On approximately this same date, February 24, 1975, the Veterans Administration obtained knowledge through Oklahoma Mortgage, that the signature of co-mortgagor Zelma R. Durham was allegedly forged on the Note and Mortgage. Based on this information, the Veterans Administration began an investigation into the alleged forgery. However, Home Savings was never notified by the Veterans Administration

of the allegations of forgery or of the investigation and on March 28, 1975, Home Savings submitted its claim for reimbursement under the Loan Guaranty Certificate in the amount of $6,739.68. In filing its claim for reimbursement, Home Savings complied with all the applicable rules and regulations of the Veterans Administration. On April 4, 1975 the Veterans Administration forwarded $30,000.00 to Home Savings representing the sale price of the property pursuant to the Sheriff's sale. The Veterans Administration thereafter, on April 16, 1975, with knowledge that an alleged forgery existed on the Note and Mortgage, and having received Home Savings' claim for reimbursement under the Loan Guaranty Certificate, sold the property to Clyde and Lillian O. Muse for a sale price of $31,000.00. This sum represents a cash downpayment of $2,000.00 and $29,000.00 being financed by the Veterans Administration under the terms of a separate Note and Mortgage. The selling price was $1,000.00 more than the price which the Veterans Administration had paid Home Savings for the property. Sometime later Home Savings' claim for reimbursement on the Loan Guaranty was reduced to $6,733.19 because of a variance in interest computation, and on October 16, 1975, the Veterans Administration issued Home Savings a Treasury check in that amount. Home Savings received the Treasury check representing the amount due on the Loan Guaranty on October 22, 1975 and cashed it. Later that week, on October 28, 1975, the Veterans Administration requested the return of the check, stating that it had been issued in error. Home Savings, having already cashed the Treasury check, issued a new check to the Veterans Administration for the $6,733.19 amount. The Veterans Administration ultimately denied Home Savings' claim for reimburse-

ment under the Loan Guaranty Certificate, based on its own investigation and determination that Zelma R. Durham's signature on the Mortgage and Note was a forgery. Thereafter, on January 19, 1976, the Veterans Administration demanded an additional $1,055.44 plus daily interest of $0.18, for the loss to the Veterans Administration which was a result of the costs involved in the transfer and sale of the property. Home Savings refused to comply with this last demand and the Veterans Administration collected the amount by an offset against a subsequent, unrelated claim. Thus, on October 20, 1976 the Veterans Administration collected from Home Savings by offset the amount of $1,104.94.

II. CONCLUSIONS OF LAW

This action orginated in the District Court of Oklahoma County, Oklahoma, Defendant Max Cleland, Administrator for the Veterans Administration, being subject to the jurisdiction of the state court pursuant to 28 U.S.C. § 1820(a)(1). Oklahoma Mortgage and American First are corporations duly organized and existing under the laws of the State of Oklahoma with their principal place of business located in Oklahoma City, Oklahoma. Home Savings is a corporation duly organized and existing under the laws of the State of Oklahoma with its principal place of business in Lawton, Oklahoma. The action was removed by Max Cleland to the United States District Court for the Western District of Oklahoma pursuant to 28 U.S.C. §§ 1346(a), 1361 which authorize suit in federal court when an employee of an agency of the United States is sued for actions that are within the scope of his office. Accordingly, this Court has jurisdiction over the subject matter and parties of this litigation.

Plaintiff urges that the Veterans Administration should be estopped to deny the validity and genuineness of Zelma R. Durham's signature on the Note and Mortgage since it had actual knowledge of the alleged forgery on the same date that it accepted the Sheriff's Deed, February 24, 1975. Instead of notifying Home Savings of the alleged forgery and transferring the property back to it in accordance with VA Regulation 4320, the Veterans Administration sold the property on April 16, 1975 to Clyde and Lillian O. Muse. Home Savings stresses that had it known of the existence of the alleged forgery and that it was the Veterans Administration's intention to possibly deny Home Savings' claim under the Loan Guaranty Certificate, Home Savings certainly would not have elected to convey the subject property by Sheriff's Deed to the Veterans Administration, but would have kept the property to sell at the highest possible price in order to minimize its loss, in the event of a determination that the forgery did in fact exist.

In several recent cases, the courts, in resolving an issue of estoppel against the Government, have held that the Government was estopped in some particular where estoppel was found to be necessary to prevent injustice to private parties who had relied to their detriment upon statements or conduct furnished them by a government agent, the only limitation being that the invocation of estoppel against the Government does not impair the public's interests. See 27 ALR Fed. 702 § 8, Estoppel Against Federal Government; *Russell Corporation* v. *United States*, 537 F.2d 474 (Court of Claims 1976); *U.S.* v. *Lazy F.C. Ranch*, 481 F.2d 985 (9th Cir. 1973); *United States* v. *State of California*, 403 F.Supp. 874 (E.D.Cal. 1975); *U.S.* v. *31.45 Acres of Land*, 376 F. Supp.

1277 (E.D.Wash. 1974); *Oil Shale Corporation* v. *Morton*, 370 F.Supp. 108 (D.Colo. 1973).

For the doctrine of estoppel to be applied, however, the facts must show the following elements to be present: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party assessing the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. *Russell Corp.* v. *United States, supra*, 537 F.2d at 484; *United States* v. *State of California*, supra, 403 F.Supp. at 900; *Flesner* v. *Cooper*, 162 P.1112 (Okla. 1917).

In the case at bar these elements are clearly satisfied. Thus the Veterans Administration, having been put on notice of a potential forgery of one of the signatures on the Note and Mortgage went ahead and purchased and subsequently sold the property without notifying Home Savings of the alleged forgery or the possibility that it would not be reimbursed on the Loan Guaranty Certificate. The Veterans Administration, by conveying the property to the Muse's, effectively precluded Home Savings from making itself whole by retaining the property and possibly reselling at a higher price.

The Veterans Administration cannot accept the benefit of its conveyance to the Muse's while at the same time denying the validity of one of the essential elements of such conveyance. 16 O.S. § 11. See also, *Burke Aviation Corporation* v. *Alton Jennings Company*, 377 P.2d 578 (Okla. 1963).

Furthermore, the Veterans Administration will sustain no loss nor incur any detriment by paying this Loan Guaranty since the Servicemen's Readjust-

ment Act of 1944 affords an independent right of indemnity to the Veterans Administration. Thus, the public policy of the United States will not be significantly frustrated by directing the Veterans Administration to fully satisfy Home Savings' claim under the Loan Guaranty Certificate.

Accordingly, despite an earlier determination by the Court that the Veterans Administration is not barred by any estoppel theory, the Court now holds that the Veterans Administration should be equitably estopped to deny the validity of Zelma R. Durham's signature on the Note and Mortgage. Home Savings therefore is entitled to judgment against the Veterans Administration in the amount of $7,838.13 which includes $6,733.19 as its Loan Guaranty claim and $1,104.94 in amounts which were wrongfully offset against it. Prejudgment interest and attorney's fees are not awarded, subject to a timely filed motion by Home Savings requesting same.

IT IS SO ORDERED this 22nd day of July, 1980.

/s/ Lee R. West
LEE R. WEST
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-78-1106-W

HOME SAVINGS & LOAN ASSOCIATION OF LAWTON, OKLAHOMA, DEFENDANTS

vs.

AMERICAN FIRST TITLE & TRUST COMPANY, OKLAHOMA MORTGAGE COMPANY, INC., MAX CLELAND ADMINISTRATOR OF THE VETERANS ADMINISTRATION, DEFENDANTS

[Filed Jul. 22, 1980]

JUDGMENT

Based on the Findings of Fact and Conclusions of Law filed herein on July 22nd, 1980, judgment is hereby entered in favor of Plaintiff, Home Savings and Loan Association of Lawton, Oklahoma, and against Defendant Max Cleland, Administrator of the Veterans Administration, in the amount of $7,838.13. No liability is found concerning Defendant American First Title and Trust Company and Defendant Oklahoma Mortgage Company, Inc.

Costs are awarded to Plaintiff.

Dated this 22nd day of July, 1980.

/s/ Lee R. West
LEE R. WEST
United States District Judge
Entered in Judgment Docket 7-22-80

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-78-01106-E

HOME SAVINGS AND LOAN ASSOCIATION
OF LAWTON, OKLAHOMA, PLAINTIFF

vs.

AMERICAN FIRST TITLE AND TRUST COMPANY,
a corporation, OKLAHOMA MORTGAGE COMPANY, INC.,
a corporation, and MAX CLELAND, Administrator
of the Veterans Administration, DEFENDANTS

[Filed Aug. 29, 1979]

ORDER

This case originally arose out of a default on a mortgage note upon which the Veterans Administration had issued a Loan Guarantee Certificate. The mortgage and certificate came into the possession of the plaintiff by an assignment from the original holder, Oklahoma Mortgage Company, on April 23, 1971. Subsequently, the loan went into default, and the plaintiff foreclosed on the mortgaged property and caused a Sheriff's Deed to be issued to the Veterans Administration on February 24, 1975. The Veterans Administration claims that it was informed on the same date that one of the purported makers of the note, Zelma R. Durham, whose monthly income was part of the basis upon which the Loan Guarantee Certificate was issued, had not in fact signed the note, but rather her signature was forged.

The Veterans Administration claims that it conducted an investigation into the validity of the ques-

tioned signature and determined that it was not genuine. The Veterans Administration then demanded and received $6,733.18, which had previously been paid to the plaintiff on the Loan Guarantee Certificate, plus $1,055.44 interest obtained by offset against other claims filed by the plaintiff against the Veterans Administration.

The plaintiff has filed a motion for summary judgment against Max Cleland, Administrator of the Veterans Administration, for the amounts quoted above. The plaintiff claims that the Veterans Administration is estopped to deny the validity and genuineness of Zelma R. Durham's signature on the note and mortgage to defeat the plaintiff's claim under the Loan Guarantee Certificate. The plaintiff further contends that even if there was a forgery, which it specifically denies, the defense of forgery may be available against Oklahoma Mortgage Company, the original lender, but not against the plaintiff.

Co-defendant American First Title and Trust Company has filed a "Response" in support of the plaintiff's motion against its co-defendant Max Cleland. American First agrees that the Veterans Administration is estopped to deny the validity of the signature and further contends that the defense of forgery is barred by the doctrine of res judicata.

Defendant Max Cleland, Administrator of the Veterans Administration, has filed a "Cross-Motion for Summary Judgment," claiming that he is entitled to a judgment against the plaintiff as a matter of law. He argues that the Veterans Administration is not estopped to deny the validity of the signature, nor is such a defense barred by the doctrine of res judicata.

It appears to the court that defendant Cleland is correct in his argument that the forgery defense is not barred by the doctrine of res judicata. In the

foreclosure suit in state court, there was identity neither of parties nor of claim to the present case. No party in the state court action had an interest in showing the challenged signature to have been a forgery, as did the Veterans Administration. Furthermore, the state court action was based on an overdue note and foreclosure thereon by judicial process, whereas this action concerns a Loan Guarantee Certificate issued by the Veterans Administration.

Moreover, it appears to the court that the statutes and regulations cited both by the plaintiff and by defendant Max Cleland support the Veterans Administration's view that defendant Cleland can assert the forgery defense against the plaintiff. The court does not believe that the defense is barred by any estoppel theory. However, neither does the court believe that defendant Max Cleland is entitled to summary judgment as a matter of law at the present time. There still remains a dispute as to a material issue of fact. That issue is whether or not the signature of Zelma R. Durham on the note was in fact forged. Summary judgment is therefore inappropriate. Rule 56 Fed.R. Civ.P.

Accordingly,

IT IS ORDERED that both the Motion for Summary Judgment filed by the plaintiff and the Cross-Motion for Summary Judgment filed by defendant Max Cleland are hereby denied.

The Clerk of the Court is directed to mail a copy hereof to counsel of record.

DATED this 29 day of August, 1979.

/s/ Luther B. Eubanks
LUTHER B. EUBANKS
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

NOVEMBER TERM—December 21, 1982

Before Honorable Oliver Seth, Honorable Monroe G. McKay and Honorable Jean S. Breitenstein, Circuit Court Judges.

No. 80-1987

(D. C. No. 78-1106 W)

HOME SAVINGS AND LOAN ASSOCIATION OF LAWTON, OKLAHOMA, PLAINTIFF-APPELLEE

vs.

AMERICAN FIRST TITLE AND TRUST COMPANY, a corporation, and OKLAHOMA MORTGAGE COMPANY, INC., a Corporation, DEFENDANTS

ROBERT P. NIMMO, Administrator of the Veterans Administration, DEFENDANT-APPELLANT

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

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No. 83-277

In The
Supreme Court of the United States
October Term, 1983

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS,

Petitioner,

vs.

HOME SAVINGS AND LOAN ASSOCIATION OF LAWTON, OKLAHOMA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Administrator of Veterans Affairs may be equitably estopped from asserting the defense of forgery to a loan guaranty claim (38 U. S. C. Ch. 37), where the Veterans Administration has actual knowledge of an alleged forgery when it accepts a sheriff's deed and thereafter sells the real property without advising the holder (Home Savings and Loan) of the forgery or V. A.'s investigation.

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Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari seeking review of the Tenth Circuit's decision in this case. That decision is reported at 695 F. 2d 1251 and Appendix A, Pages 1A-26A of the Petition.

The opinion of the District Court (West, J.) is not reported, but appears in Appendix C, Pages 30A-37A of the Petition.

STATEMENT OF THE CASE

A. Procedural Background

This action originated in the District Court of Oklahoma County, Oklahoma, the Administrator of the Veterans' Administration (now Veterans Affairs), being subject to the jurisdiction of the State Court pursuant to 38 U. S. C. § 1820(a) (1).[1]

Home Savings and Loan Association commenced the suit to recover the sum of $7,838.13 on a loan guaranty certificate issued by the Veterans' Administration.

The action was removed by the Administrator to the United States District Court for the Western District of Oklahoma pursuant to 28 U. S. C. § 1346(a), § 1361 which authorize suit in Federal Court when an employee of an agency of the United States is sued for actions that are within the scope of his office.

On July 22, 1980, the Honorable Lee R. West, United States District Judge for the Western District of Oklahoma, entered judgment in favor of Home Savings against the Veterans' Administration in the amount of $7,838.13, which included $6,733.19 on its loan guaranty claim and $1,104.94 in amounts which were wrongfully offset against it.

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[1] 38 U.S.C. § 1820(a)(1) provides:

"Notwithstanding the provisions of any other law, with respect to matters arising by reason of this chapter, the Administrator may - (1) *Sue and be sued in the Administrator's official capacity in any court of competent jurisdiction, state or federal,* but nothing in this clause shall be construed as authorizing garnishment or attachment against the Administrator, the Veterans' Administration, or any of its employees."

On September 9, 1980, the Trial Court granted Home Savings' motion to tax prejudgment interest and ordered the Administrator to pay the statutory rate of six percent (6%) from the date the amount was owed until the date of judgment.

On appeal, the V. A. contested the applicability of equitable estoppel as well as the award of prejudgment interest. Thereafter, the Veterans' Administration withdrew its assertion of error regarding the award of prejudgment interest to Home Savings. (App. A, Page 8a of the Petition).

The judgment of the Trial Court was affirmed by the Court of Appeals (McKay, J., dissenting). The majority carefully scrutinized the "affirmative actions" of the V. A. and concluded that the invocation of equitable estoppel against the Veterans' Administration was warranted under the circumstances in this case. The Court of Appeals acknowledged the decisions of this Court and found nothing which clearly foreclosed the availability of equitable estoppel against the government based upon the facts presented in the case at bar.

In concluding that the V. A. was estopped from denying the validity of the original loan transaction, the Court of Appeals particularly noted that the V. A. "acquired and sold the property without disclosure to Home Savings of the forgery possibility." (App. A, Pages 7a of Petition). The majority also agreed with the Trial Court that the imposition of estoppel has not harmed the fiscal policies of the United States since the Veterans' Administration has an independent right of indemnity from the borrowing veterans. (App. A, Page 7a of the Petition).

In his dissent, Judge McKay disagreed with the majority's characterization of Respondent's claim as a "commercial transaction." (App. A, Page 13a, et seq., of the Petition). Judge McKay did not believe that the loan guaranty could be properly characterized as a proprietary commercial transaction for the purpose of applying equitable estoppel against the government. (App. A, Page 14a of the Petition). According to Judge McKay, the loan and guaranty program is a "subsidy in support of a public policy objective." Moreover, Judge McKay could perceive no differences between the loan guaranty program for veterans and the crop insurance program for farmers, as discussed in *Federal Crop Insurance Corp. v. Merrill,* 332 U. S. 380 (1948). (App. A, Page 15a of the Petition).

On April 25, 1983, the Administrator's Petition for Rehearing with the suggestion for rehearing en banc was denied. Circuit Judges McKay, Logan and Seymour dissenting. (App. B, Pages 27a-29a of the Petition).

B. Facts Material to the Consideration of the Question Presented

As the Administrator has stated and Home Savings agrees, this case originally arose out of a default on a note and mortgage upon which the Veterans' Administration had issued a loan guaranty certificate pursuant to 38 U. S. C. Ch. 37.

In April 1971, Oklahoma Mortgage Company loaned $34,000.00 to Percy Durham, a veteran, and his wife, Zelma Durham. The note, mortgage and loan guaranty certificate were assigned to Home Savings and Loan Association.

On or about March 1, 1974, the mortgagors, Percy L. and Zelma R. Durham, defaulted on the note and mortgage and a foreclosure suit was instituted by Home Savings on July 12, 1974, in a case filed in the Oklahoma County District Court. The co-mortgagor, Zelma R. Durham, was personally served with process and made no denial that she was co-mortgagor, nor did she make any assertion that her signatures on the note and mortgage were not genuine nor valid.

On or about December 6, 1974, a Journal Entry of Judgment was entered in the foreclosure case by the District Court, which effectively quieted title to the property and specifically recited:

> "The Court further finds that the Defendants and original mortgagors, Percy L. Durham and Zelma R. Durham, husband and wife, made, executed and delivered the note and mortgage sued upon by the Plaintiff (Home Savings), and that said Plaintiff is the owner/holder thereof by assignment of record."

The property was sold by the sheriff of Oklahoma County, with appraisement, to Home Savings, on January 28, 1975, pursuant to special execution and order of sale, for the sum of $30,000.00, the amount the Veterans' Administration specified pursuant to 38 C. F. R. § 36.4320 (a). Home Savings elected to convey the property to V. A. and on February 24, 1975, the V. A. accepted a sheriff's deed pursuant to the order of Home Savings. On approximately the same date, February 24, 1975, the Veterans' Administration obtained actual knowledge through Oklahoma Mortgage Company, that the signature of co-mortgagor, Zelma R. Durham, was allegedly forged on the note and mortgage. Based upon this information, the

Veterans' Administration initiated an investigation into the alleged forgery, however, Home Savings was never notified by the V. A. of either the forgery allegation or of the V. A. investigation.

On March 28, 1975, Home Savings submitted its claim for reimbursement under the loan guaranty certificate in the amount of $6,739.68. In filing its claim for reimbursement, Home Savings complied with all of the applicable rules and regulations of the Veterans' Administration. Thereafter, on April 4, 1975, the Veterans' Administration forwarded $30,000.00 to Home Savings representing the sale price of the property specified by V. A. at the sheriff's sale.

On April 16, 1975, the Veterans' Administration, with full knowledge that an alleged forgery existed on the note and mortgage, and having received Home Savings' claim for reimbursement on the loan guaranty certificate, sold the subject property for the sum of $31,000.00. This sum represented a cash downpayment of $2,000.00 and $29,000.00 being financed by the Veterans' Administration under the terms of the separate note and mortgage. The selling price was $1,000.00 more than the price which the Veterans' Administration had paid Home Savings for the property. Some time later, Home Savings' claim for reimbursement on the loan guaranty was reduced to $6,733.19 because of a variance in interest computation, on October 16, 1975, the Veterans' Administration issued Home Savings a treasury check in that amount. On October 22, 1975, Home Savings received this check representing the amount due on the loan guaranty and negotiated it. Later that week, on October 28, 1975, the Veterans' Administra-

tion requested the return of the check, stating that it had been issued in error. Home Savings then issued a new check to the V. A. in the above stated amount as the original check had already been cashed.

The Veterans' Administration ultimately denied Home Savings' claim for reimbursement on the loan guaranty certificate, based upon its own internal investigation and determination that Zelma R. Durham's signature on the note and mortgage was a forgery. The investigation conducted by the Veterans' Administration was instituted without notice or hearing afforded Home Savings, and it had no opportunity to participate in the depositions or have access to handwriting samples.

On January 19, 1976, the Veterans' Administration demanded an additional $1,055.44 plus daily interest of $.18, which allegedly represented the V. A.'s loss as a result of the costs incurred in the transfer and sale of the property. Home Savings refused to comply with this last demand and the Veterans' Administration collected the amount by an offset against a subsequent unrelated claim. Thus, on October 20, 1976, the Veterans' Administration collected from Home Savings by offset, the amount of $1,104.94. (App. A, Pages 32A-34A of the Petition).

On July 11, 1973, Mrs. Zelma R. Durham, joined with her husband, Percy Durham, and conveyed all of their right, title and interest in the subject property to John Gilbert Durham, by warranty deed. It is uncontroverted that Mrs. Durham did in fact execute this deed by virtue of her admission at trial. (Tr. 21-22).

REASONS FOR DENYING THE PETITION

A. The Administrator's Petition Fails to Present Special and Important Reasons to Invoke the Jurisdiction of this Court.

The reasons advanced in the Administrator's Petition to obtain this Court's review on Writ of Certiorari, can be properly characterized as ridiculous.

In this connection, Petitioner seeks to leave this Court with the impression that:

> "The decision of the Court of Appeals threatens the sound administration of the V. A. Home Loan Guaranty Program, as well as other federal programs, by preventing recovery of substantial sums of money owed to the government." (Page 11 of Petition).

Regretfully, the Administrator fails to articulate in precise terms, the basis for such a conclusionary statement. Instead, he focuses on the factual circumstances in this case and asserts that imposition of equitable estoppel is not justified. This Court ordinarily does not grant certiorari to review evidence and discuss specific facts. *The United States v. Johnston,* 268 U. S. 220, 227 (1925).

Moreover, the Administrator's petition fails to identify any conflict between the Circuit decisions. In fact, other circuits have generally held that the government can be equitably estopped. See e. g., *Russell Corporation v. United States,* 537 F. 2d 474 (Ct. Cl. 1976); *Corniel-Rodriguez v. INS,* 532 F. 2d 301 (2d Cir. 1976); *Walsonavitch v. United States,* 335 F. 2d 96 (3d Cir. 1964); *Tuck v. Finch,* 430 F. 2d 1075 (4th Cir. 1970); *Simmons v. United States,* 308 F. 2d 938, 945 (5th Cir. 1962); *Portmann v.*

United States, 674 F. 2d 1155 (7th Cir. 1982); *Meister Bros. v. Macey*, 674 F. 2d 1174 (7th Cir. 1982); *United States v. Fox Lake State Bank*, 366 F. 2d 962 (7th Cir. 1966); *United States v. Wharton*, 514 F. 2d 406 (9th Cir. 1975); *Semaan v. Mumford*, 335 F. 2d 704, 706 (D. C. Cir. 1964). The decision of the Tenth Circuit is in complete accord with the above mentioned Circuits.

Supreme Court Rule 17 clearly provides that review "will be granted only when there are special and important reasons therefor." The estoppel issue in the present case is narrow and unique to its facts and no amount of government rhetoric can convert it into one warranting review on certiorari. The insufficiency to warrant a grant of certiorari is aptly demonstrated at Page 10 of the Petition wherein Petitioner erroneously concludes:

> ". . . the decision conflicts with this Court's repeated instruction to the lower Courts not to use estoppel as a means of circumventing statutorily authorized restrictions on payments from the Federal Treasury."

Schweiker v. Hansen, 450 U. S. 785 at 788, quoting *F.C.I.C. v. Merrill*, 332 U. S. 380 at 385 (1947).

The Administrator conveniently ignores and fails to address the distinguishing characteristics between the instant case and *Schweiker v. Hansen*, supra. In *Schweiker*, this Court noted that in several of the cases it distinguished "the government had entered into written agreements which supported the claim of estoppel" and that in others, "estoppel did not threaten the public fisc." It is readily apparent from an examination of the Court of Appeals' well reasoned opinion, that the case at bar clearly

exhibited both these distinguishing characteristics. This issue will be more fully addressed in Section B.

As Respondent has previously stressed, the reasons set forth in the Administrator's Petition for Certiorari for further prolonging this controversy are wholly lacking in substance.

This is not a case where the Court should exercise its discretion and grant the Writ of Certiorari because the facts are peculiar to this case and the Administrator simply disagrees with the result.

B. Equitable Estoppel is Properly Invoked Against the Administrator.

At the outset, it is necessary to dispel the Administrator's erroneous statement that the doctrine of sovereign immunity prohibits the imposition of equitable estoppel against the government. (Page 11 of the Petition).

There can be no doubt that sovereign immunity has been waived by virtue of 38 U. S. C. § 1820(a) (1) which provides:

> "Notwithstanding any other law, with respect to matters arising by reason of this chapter, the Administrator may - 1. Sue and be sued in the Administrator's official capacity in any competent jurisdiction, state or federal . . . ."

Thus, it is clear that Congress "launched the Veterans' Administration into the commercial world" and fully authorized the practice of acting as guarantors of mort-

gage loans in a proprietary or business capacity, as opposed to a governmental or sovereign function.[2]

As this Court stated in *United States v. Shimer*, 367 U. S. 374, 383, 81 S. Ct. 1554, 1561, 6 L. Ed. 2d 908:

> "Congress intended the guaranty provisions to operate as the substantial equivalent of a downpayment in the same amount by the veteran on the purchase price, in order to induce perspective mortgagee-creditors to provide, one hundred percent financing for a veteran's home."[3]

Underlying all of the recent government estoppel cases decided by this Court, is the concept that affirmative misconduct by the government may be sufficient to invoke the doctrine of equitable estoppel against the government.[4] These decisions clearly imply that, presented with the proper case, this Court would find affirmative misconduct sufficient to estop the government. Even Petitioner concedes that affirmative misconduct may be grounds for estopping the government. (Petition Page 10).[5]

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[2]Both the Administrator (Page 14 of the Petition) and McKay, (App. A, Page 14a of the Petition), erroneously state that the loan guaranty cannot be properly characterized as a proprietary commercial transaction for the purposes of applying equitable estoppel against the government.

[3]Thus, it is clear that the guaranty is considered the equivalent of a downpayment in an ordinary commercial transaction and not like a subsidy as urged by the Administrator and Judge McKay. (App. A, Pages 14a-15a of the Petition).

[4]*INS v. Miranda*, — U. S. —, 74 L. Ed. 2d 12 (1982); *Schweiker v. Hansen*, 450 U. S. 785 (1981); *INS v. Hibi*, 414 U. S. 5 (1973); *Montana v. Kennedy*, 366 U. S. 308 (1961).

[5]At Page 10 of his Petition, the Administrator states that "serious" affirmative misconduct is required to estop the gov-

(Continued on following page)

Both the District Courts and Court of Appeals correctly determined that the affirmative misconduct of the V. A. arose from its actions in acquiring and selling the property without disclosing to Home Savings of the forgery possibility. (App. A, Page 7a of the Petition).[6]

According to the Petitioner in the absence of a statute, regulation or constitutional provision to the contrary, V. A. had no obligation to disclose the allegation of forgery. This proposition is fundamentally erroneous and contrary to common law principles of guaranty contract law, which are generally applicable to the Veterans' Administration.[7] Moreover, in *Lynch v. U. S.*, 292 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934) this Court specifically stated:

> "that when the United States government, or any branch thereof, enters into a contract with an individual, natural or corporate, it does so in its private or business capacity and not as a sovereign, and subjects itself to the same rules of law that govern contracts between individuals."

It is clear that Home Savings elected to convey the property to the Veterans' Administration pursuant to 38 C. F. R. § 36.4320(a) (1) since they had a valid loan guaranty certificate as well as a judicial finding in the foreclosure action that the original mortgagors, Percy L. Dur-

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ernment. None of the recent government estoppel cases, as mentioned above, contain any reference to "serious."

[6]McKay, J., dissenting also advances the untenable argument that V.A. had no legal duty to disclose an allegation of forgery. (App. A., Page 24a of the petition).

[7]28 Am. Jur. 2d Estoppel and Waiver § 68; *Mortgage Associates v. Cleland*, 494 F. Supp. 683 (1980), rev. on other grounds, 653 F. 2d 1144 (7th Cir. 1981).

ham and Zelma R. Durham, executed the note and mortgage. The manner in which the Veterans' Administration processed Home Savings' claim for reimbursement on the loan guaranty certificate can only be characterized as "business as usual," notwithstanding its knowledge of an alleged forgery.[5]

Certainly, Home Savings had every right to believe that the loan guaranty certificate would be honored since it complied with all of the applicable rules and regulations of the Veterans' Administration. Furthermore, the V. A.'s acceptance of the sheriff's deed based upon the foreclosure action, its payment of the specified amount ($30,000.00), and subsequent sale of the property on April 16, 1975, with actual knowledge of an alleged forgery, undoubtedly would and did, in fact, mislead Home Savings.

This case is certainly not analogous to either *Schweiker v. Hansen*, supra, or its predecessor, *F. C. I. C. v. Merrill*, supra. In the instant case, the government entered into a commercial written agreement which supported the claim of estoppel. Furthermore, the imposition of estoppel would not threaten the public fisc as this Court felt it would in *Schweiker*. Probably, the most

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[5]It is totally irrelevant that V.A. obtained knowledge of the forgery after Home Savings' election to convey the property to V.A. pursuant to 38 C.F.R. 36.4320(a)(1). The consideration ($30,000.00) for that option to convey was not forwarded to Home Savings until April 4, 1975, more than thirty (30) days from when V.A. had knowledge of the forgery. Home Savings had every right to revoke the election to convey the property and demand a reconveyance if there existed a bar to its loan guaranty claim.

striking dissimilarity is the existence of affirmative misconduct on the part of the Veterans' Administration.

After carefully weighing the equities in the context of these particular facts, it would be a great injustice if the Veterans' Administration was not held responsible for its affirmative misconduct in selling the property without notifying Home Savings of the forgery and the fact it would not be reimbursed on the loan guaranty certificate. The Veterans' Administration cannot accept the benefit of its sale and conveyance of April 16, 1975, while at the same time denying the validity of one of the essential elements of such conveyance. It is impossible for the V. A. to get the property back, and the decision of both the Trial Court and Court of Appeals recognized this.

As Justice Cardozo stated long ago, "It is a fundamental and unquestioned principle of our jurisprudence that no one shall be permitted to take advantage of his own wrong." *R. H. Sterns v. United States,* 291 U. S. 54, 61-62, 54 S. Ct. 325, 328, 78 L. Ed. 647, 653 (1934).

CONCLUSION

The government has requested the Court to hold this case pending the disposition of *Heckler v. Community Health Services,* No. 83-56 (cert. granted October 3, 1983).

Home Savings submits that the pendency of the above mentioned case should not affect the disposition of the Administrator's Petition herein. The cases are vastly dissimilar and Respondent has presented compelling rea-

sons why this Court should end this litigation once and for all by denying certiorari.

Respectfully submitted,

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